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No. 2300

United States
Circuit Court of Appeals

For the Ninth Circuit.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,

Plaintiffs in Error,

vs.

JAMES HENEY,


Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Third Division.

FILED

SEP 6 - 1913



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Records of M. S. Circuit
Court of Appeals

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United States
Circuit Court of Appeals

For the Ninth Circuit.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,

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vs.

JAMES HENEY,

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Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Third Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff and Appellee,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and THE
KATALLA COMPANY, a Corporation,
Defendants and Appellants.

Names and Addresses of Attorneys of Record.

E. E. RITCHIE, Valdez, Alaska, Attorney for
Plaintiff and Appellee.

R. J. BORYER, Cordova, Alaska, Attorney for De-
fendants and Appellants. [1*]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

versus

THE COPPER RIVER & NORTHWESTERN
RAILWAY COMPANY, a Corporation, and
THE KATALLA COMPANY, a Corpora-
tion,

Defendants.

*Page-number appearing at foot of page of original certified Record.

Complaint.

Plaintiff complains of defendants and alleges:

I.

That the defendant, the Copper River & Northwestern Railway Company, is a corporation existing under the laws of the State of Nevada, owning and operating a line of railroad from Cordova, on the Gulf of Alaska, to and beyond the Copper River directly east of the Town of Chitina, all in the Territory of Alaska, and was such corporation at all times hereinafter mentioned. That the defendant, the Katalla Company, is a corporation organized under the laws of the State of New York and doing business in the Territory of Alaska, and was such corporation during all the times hereinafter mentioned. That said Katalla Company is a subsidiary company of the Copper River & Northwestern Railway Company; that in operating said line of railroad the said Copper River & Northwestern Railway Company transacts its business partly through said Katalla Company, which nominally employs and directs many of the men working on said railroad line, but plaintiff is not informed nor is the general public informed, what are the precise functions of said Katalla Company, nor what are its relations to the Copper River & Northwestern Railway Company, but he alleges on information and belief that the said Katalla Company is a mere agency of the [2] said Copper River & Northwestern Railway Company and the operations of said Katalla Company are in reality operations of the Copper River & Northwest-

ern Railway Company, and the Copper River & Northwestern Railway Company is the real employer of men working on its said line in the operation and maintenance of the same.

II.

That on the 19th day of January, 1912, plaintiff was working in the employ of said Copper River & Northwestern Railway Company, in the nominal employ and under the nominal direction of said Katalla Company, agent of said railway company as aforesaid, in the tunnel on said railway company's line immediately east of the town of Chitina; that plaintiff's work was that of "lagging" the sides of a timber structure over part of said tunnel where a cave-in had occurred, to prevent further caving of the ground overhead; that in doing said work of lagging plaintiff and others worked from a platform at the top of the tunnel proper; that the construction of said platform was incomplete and several gaps had been left in it, one extending across the entire width of the tunnel and about six feet of the linear projection thereof; that this gap or open space in said platform had been negligently left by the defendant corporations without guard-rails; that said tunnel was very dark and the said corporations had negligently failed to place lights adjacent to said gap in said platform to indicate its location, and had failed to furnish lights to the men working in the tunnel to be placed adjacent to said gap in the platform to warn all persons of its location.

III.

That about 3 o'clock in the afternoon of said 19th

day of January, 1912, when the darkness in said tunnel was intensifying because of the coming of night, the defendant corporations, by their agents and servants, to this plaintiff unknown, wilfully, negligently and wrongfully, ran a locomotive drawing a train of cars through said tunnel, said locomotive leaving a dense volume of coal smoke and a suffocating quantity of coal gas in said tunnel [3] still further intensifying the darkness of the tunnel; that because of said smoke and gas in the tunnel at the place where plaintiff was working, plaintiff was wholly unable to see anything, and was unable to breathe without painful, suffocating and sickening inhalation of coal gas; that for the purpose of escaping from said smoke, gas and intense darkness of the tunnel at the place where he had been working, plaintiff walked slowly and cautiously toward the westerly entrance of said tunnel, to reach which, the same being the only place of exit from said tunnel at that time, it was necessary to pass the said gaps and open space in said platform; that plaintiff proceeded with great care, endeavoring to feel his way, but being confused by the darkness and partially strangled by the inhalation of coal gas as aforesaid, he moved in a state of partial bewilderment, and while groping slowly along said platform he inadvertently stepped into the gap in said platform hereinbefore particularly described and fell to the floor of the tunnel, a distance of about twenty-three feet, upon loose rocks and frozen muck, badly spraining his back and dislocating one or more of the bones of his left hip and rupturing several ligaments of said hip; that in con-

sequence of said injuries plaintiff was confined to his bed for six weeks thereafter continuously, and suffered great physical pain and mental anguish during all of said time, and he has ever since at all times suffered physical pain to a greater or less extent because of said injuries, and ever since leaving his bed has been able to walk only by the aid of crutches, which he is still obliged to use. Plaintiff alleges that said injuries to his hip are permanent, and that because of them he will never again be able to work at his vocation, that of a miner; that he will be able during the remainder of his life to perform only inferior work at inferior pay, whereby his earning capacity and power are permanently impaired to the extent of at least \$2.00 per day; that he is informed by competent medical and surgical authority that he will always suffer pain because of his said injuries, and that repeated surgical [4] operations will be required from time to time to prevent his becoming a helpless invalid. Plaintiff is unable to give a more technical and particular description of his said injuries, but avers that a description of the same is fully within the knowledge of defendant corporations through reports made by Dr. W. W. Council, one of the surgeons employed by said companies, who has made several examinations of said injuries suffered by plaintiff as aforesaid. Plaintiff alleges that at the time of suffering the injuries hereinbefore described he was a strong, able-bodied man in perfect health, capable of earning the highest going wages as a miner, and that at said time he was earning and receiving \$5.00 per day.

[Summons.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN
RAILWAY COMPANY, a Corporation, and
THE KATALLA COMPANY, a Corpora-
tion,

Defendants.

The President of the United States of America,
Greeting: To the Above-named Defendants:

YOU ARE HEREBY REQUIRED to appear in
the District Court for the Territory of Alaska, Third
Division, within thirty days after the day of service
of this summons upon you, and answer the complaint
of the above-named plaintiff, a copy of which com-
plaint is herewith delivered to you; and unless you
so appear and answer, the plaintiff will take judg-
ment against you for the sum of Twenty-five Thou-
sand Dollars and costs, and apply to the Court for
the relief demanded in said complaint.

WITNESS, the Hon. THOMAS R. LYONS,
Judge of said Court, this first day of August, in the
year of our Lord one thousand nine hundred and

twelve and of our Independence the one hundred and thirty-seventh.

[Seal]

ED. M. LAKIN,
Clerk.

By V. A. Paine,
Deputy Clerk.

Marshal's No. 403. [7]

United States of America,
Territory of Alaska,
Third Division,—ss.

I hereby certify that I received the annexed summons on the 8th day of August, 1912, and thereafter on the 15th day of August, 1912, I served the same at Cordova, Alaska, upon the Copper River & Northwestern Railway Company, by delivering to and leaving with George Geiger, service agent of said company, a copy thereof, together with a certified copy of the complaint filed therein. And thereafter on the same date I served the same upon the Katalla Company by delivering to and leaving with George Geiger, service agent of said company, a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 15th day of August, 1912.

H. P. SULLIVAN,
U. S. Marshal.

By S. T. Brightwell,
Deputy.

Marshal's Costs:

2 services\$12.00

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 22, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [8]

*In the District Court for the Territory of Alaska,
Third Division.*

#C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corp., and THE KA-
TALLA COMPANY, a Corp.,

Defendants.

Motion to Quash Summons.

Comes now the Katalla Company, a corporation, organized and existing under the laws of the State of New York, appearing specially for this motion and not otherwise, and moves the Court to quash the summons in this action as against the Katalla Company, a corporation, existing under the laws of the State of New York for the reason that the summons and complaint in the above case was served upon George Geiger, who is not now and was not at the time of the service of the summons in this case, an agent or representative of the Katalla Company, a corporation existing under the laws of the State of Nevada, and is not in any way connected with or authorized, nor was at the time of the service of the summons in this case, connected with or authorized to ac-

cept service for the Katalla Company, a corporation, existing under the laws of the State of Nevada. That the said George Gieger upon whom service was made in this case is an agent of the Katalla Company, a corporation, existing under the laws of the State of New York and the representative agent upon whom the service is to be made for said corporation; that the Katalla Company, a corporation, existing under the laws of the State of Nevada, is a separate and distinct person or corporation from the Katalla Company, a corporation, existing under the laws of the State of New York. That this motion is based upon the hereto attached affidavits and the return of the service and the complaint in the case of James Heney, Plaintiff, vs. The Copper [9] River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, defendants.

WHEREBY, defendant, the Katalla Company, a corporation, existing under the laws of the State of New York, moves this Honorable Court to quash the service of the summons in this case.

R. J. BORYER,

Attorney for the Katalla Company, a Corporation,
Organized and Existing Under the Laws of New
York.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 16, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [10]

*In the District Court of the Territory of Alaska,
Third Division.*

#C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and the
KATALLA COMPANY, a Corporation,
Defendants.

**Affidavit of R. J. Boryer in Support of Motion to
Quash Summons.**

R. J. Boryer, being first duly sworn, upon his oath deposes and says: That he is Attorney for the Copper River & Northwestern Railway Company, a corporation organized and existing under the laws of the State of Nevada, and is attorney for the Katalla Company, a corporation organized and existing under the laws of the State of New York; that on the 15th day of August A. D. 1912, a copy of summons and the complaint, in which James Heney is named as plaintiff and the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, are named as defendants, said case being #C.—49 of the Third Division of the District of Alaska, was served on George Geiger in Cordova, Alaska; that the complaint in said action designated the defendant, the Katalla Company, as being a corporation organized and existing under the

laws of the State of Nevada; that this affiant personally knows and so states that the said George Geiger, upon whom service was made in this case, is not in any way connected with the defendant, the Katalla Company, named herein; that the said George Geiger is not an agent or representative of any kind of said Defendant Company, and is not in any way connected with and is not the agent of said company for the purpose of service; that the said George Geiger is the regularly appointed agent for the purpose of [11] accepting service for a separate and distinct corporation, known as the Katalla Company, a corporation existing under the laws of the State of New York; that the Katalla Company, a corporation organized under the laws of the State of Nevada, as designated in plaintiff's complaint, is a separate and distinct corporation from the Katalla Company, a corporation organized and existing under the laws of the State of New York; and that the said George Geiger is in no way connected with the Katalla Company, a corporation organized and existing under the laws of the State of Nevada.

R. J. BORYER.

Subscribed and sworn to before me this 13th day of September, A. D. 1912.

[Seal]

CHAS. A. SCOTT,
Notary Public for Alaska, Residing at Cordova.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 6, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [12]

*In the District Court of the Territory of Alaska,
Third Division.*

#C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and the
KATALLA COMPANY, a Corp.,

Defendants.

**Affidavit of J. V. Lydick in Support of Motion to
Quash Summons.**

J. V. Lydick, being first duly sworn, upon his oath deposes and says: That he is accountant for the Copper River & Northwestern Railway Company, a corporation organized and existing under the laws of the State of Nevada, and is familiar with and knows of the corporate existence of the Katalla Company, a corporation, organized and existing under the laws of the State of New York; that on the 15th day of August, A. D. 1912, a copy of summons and the complaint, in which James Heney is named as plaintiff and the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, are named as defendants, said case being #C.—49 of the Third Division of the District of Alaska, was served on George Geiger in Cordova, Alaska; that the complaint in said action designated the defendant, the Katalla Company, as being a corporation organized and existing under the

laws of the State of Nevada; that this affiant personally knows and so states that the said George Geiger, upon whom service was made in this case, is not in any way connected with the defendant, the Katalla Company, named herein. That the said George Geiger is not an agent or representative of any kind of said defendant company and is not in any way connected with and is not the agent of said company for the purpose of service; that the said George Geiger is the regularly appointed agent for the purpose of accepting service for [13] a separate and distinct corporation, known as the Katalla Company, a corporation existing under the laws of the State of New York; that the Katalla Company, a corporation organized under the laws of the State of Nevada, as designated in plaintiff's complaint, is a separate and distinct corporation from the Katalla Company, a corporation organized and existing under the laws of the State of New York; and that the said George Geiger is in no way connected with the Katalla Company, a corporation organized and existing under the laws of the State of Nevada.

J. V. LYDICK.

Subscribed and sworn to before me this 13th day of September, A. D. 1912.

[Seal]

R. J. BORYER.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 16, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [14]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN
RAILWAY COMPANY, a Corporation, and
the KATALLA COMPANY, a Corporation,
Defendants.

**Motion for Leave to Amend Complaint by Correction
of Name of Defendant, the Katalla Company.**

Now comes the plaintiff by his attorney, E. E. Ritchie, and moves the Court for leave to amend the complaint by correction of the designation of the defendant, Katalla Company, as follows, to wit: By striking out the word "Nevada" in the eighth line of the first paragraph of said complaint, and inserting in lieu thereof the words "New York." Said amendment to be made by interlineation of the original complaint on file.

Dated April 10, 1913.

E. E. RITCHIE,

Attorney for Plaintiff.

Service of copy acknowledged this 10th day of April, 1913.

R. J. BORYER,

Attorney for Katalla Company of New York.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 11, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [15]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RY. CO., a
Corp., & THE KATALLA CO., a Corp.,
Defendants.

**Order Denying Motion to Quash Service of Summons
and Granting Leave to Amend Complaint by
Correction of Name of Defendant "Katalla
Company."**

Defendant's motion to quash service of summons having come on to be heard on a prior day of this term, having been argued to the Court by E. E. Ritchie, attorney for plaintiff, and R. J. Boryer, attorney for defendants, and the Court being fully advised and having taken said matter under advisement, now renders his decision on said motion, and

IT IS ORDERED that said motion be and the same is hereby denied, and plaintiff's motion for leave to amend complaint by correction of name of defendant "Katalla Company" having been heard and argued by attorneys, and the Court being fully advised in the premises,

IT IS ORDERED that said motion be and the same is hereby granted, to which order and ruling of the Court defendants except and exception is allowed.

Special April, 1913, Term April 12th—3d Court Day.

Entered Court Journal No. C.—2, page No. 21.
[16]

*In the District Court of the Territory of Alaska,
Third Division.*

C.—No. 49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Defendants.

**Answer of Copper River & Northwestern Railway
Company.**

Comes now the COPPER RIVER & NORTH-
WESTERN RAILWAY COMPANY, answering
separately says:

I.

Answering paragraph I, admits that it is a corporation existing under the laws of the State of Nevada, but denies each and all of the other allegations contained in paragraph I of the complaint.

II.

Answering paragraph II of Complaint, denies

each and all of the allegations contained in paragraph II of complaint.

III.

Answering paragraph III of Complaint, denies each and all of the allegations contained in paragraph III of the Complaint.

IV.

Answering paragraph IV of the Complaint, denies each and all of the allegations contained in paragraph IV of the Complaint.

AFFIRMATIVE DEFENSE.

Defendant herein, for first separate, affirmative defense, alleges that if plaintiff received an injury at the time and place and manner mentioned in the complaint, said injuries were caused by and arose out of and from risks incident to his employment in which [17] he was engaged and which plaintiff assumed.

Defendant for second separate, affirmative defense, alleges:

That if Plaintiff was injured at the time and place and in the manner mentioned in the complaint, said injuries were caused by the negligence or contributory negligence of plaintiff, and of or by reason of the negligence of a fellow-servant.

Wherefore, defendant prays that this case be dismissed.

R. J. BORYER,

Attorney for Defendant Copper River & Northwestern Railway Co.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

United States of America,
District of Alaska,—ss.

I, Caleb Corser, being first duly sworn, deposes and says: That I am the Superintendent of the Copper River & Northwestern Railway Company, one of the defendants named in the above-entitled action, and that the foregoing Answer is true as I verily believe.

Subscribed and sworn to before me this, the 15th day of April, A. D. 1913.

[Notarial Seal]

R. J. BORYER,

Notary Public for the District of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [18]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Defendants.

Answer of Katalla Company.

Comes now the defendant, Katalla Company, answering separately, says:

I.

Answering paragraph I of Complaint, Katalla Company admits that it is a corporation organized under the laws of New York and doing business in the Territory of Alaska, but denies each and all of the other allegations in paragraph I concerning or alleged regarding the Katalla Company.

II.

Answering paragraph II of Complaint, defendant, Katalla Company, denies each and all of the allegations therein contained.

III.

Answering paragraph III of Complaint, defendant, Katalla Company, denies each and all of the allegations therein contained.

IV.

Answering paragraph IV of Complaint, defendant, Katalla Company, denies each and all of the allegations therein contained.

AFFIRMATIVE DEFENSE.

Defendant, Katalla Company, for the first separate affirmative defense, alleges that if plaintiff received any injury at the time and place and manner mentioned in the complaint, said injuries were caused by and arose out of and from risks incident to his employment in which [19] he was engaged and which risks the plaintiff assumed.

Defendant, Katalla Company, for second affirmative defense, says:

That if plaintiff was injured at the time and place and manner mentioned in the complaint, said injuries were caused by the negligence of the plaintiff and of or by reason of the negligence of a fellow-servant.

Wherefore defendant prays that this case be dismissed.

R. J. BORYER,
Attorney.

United States of America,
District of Alaska,—ss.

I, Caleb Corser, being first duly sworn, deposes and says: That I am the Resident Manager and attorney in fact of the Katalla Company, one of the defendants named in the above-entitled action, and that the foregoing Answer is true as I verily believe.

CALEB CORSER.

Subscribed and sworn to before me this the 15 day of April, A. D. 1913.

[Seal]

R. J. PORYER,
Notary Public for the District of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [20]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY, a Corporation, and KATALLA COM-
PANY, a Corporation,

Defendants.

Reply to Answer of Katalla Company.

Now comes the plaintiff and replying to the allegations of the affirmative defense set up in the answer of the defendant, the Katalla Company, alleges:

I.

He denies that the injuries he received as described in his complaint were caused by and arose out of risks incident to the employment in which he was engaged and which he assumed, and he denies that in the course of his said employment he assumed any risk which was an efficient cause of his said injuries.

II.

He denies that his said injuries, described in his complaint, were caused by his own negligence or contributory negligence, or by reason of the negligence of a fellow-servant, or in any degree caused by his own negligence or contributory negligence, or the negligence of a fellow-servant.

Wherefore plaintiff asks judgment as prayed for in his complaint.

E. E. RITCHIE,
Attorney for Plaintiff. [21]

United States of America,
Territory of Alaska,—ss.

James Heney, being duly sworn, says he is the plaintiff herein; that he has read the foregoing reply and he believes the same to be true.

JAMES HENEY.

Sworn to and subscribed before me this 3d day of May, 1913.

[Seal]

GEORGE DOOLEY,
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. E. Scott, Deputy. [22]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY, a Corporation, and KATALLA COM-
PANY, a Corporation,

Defendants.

Reply to Answer of Copper River & Northwestern Railway Company.

Now comes the plaintiff, and replying to the allegations of the affirmative defense set up in the answer of the defendant, Copper River & Northwestern Railway Company, alleges:

I.

He denies that the injuries he received as described in his complaint were caused by and arose out of risks incident to the employment in which he was engaged and which he assumed, and he denies that in the course of his said employment he assumed any risk which was an efficient cause of his said injuries.

II.

He denies that his said injuries, described in his complaint, were caused by his own negligence or contributory negligence or by reason of the negligence of a fellow-servant, or in any degree caused by his own negligence or contributory negligence, or the negligence of a fellow-servant.

Wherefore plaintiff asks judgment as prayed for in his complaint.

E. E. RITCHIE.

Attorney for Plaintiff. [23]

United States of America,
Territory of Alaska,—ss.

James Heney, being duly sworn, says he is the plaintiff herein; that he has read the foregoing reply and he believes the same to be true.

JAMES HENEY.

Sworn to and subscribed before me this 3d day of May, 1913.

[Seal]

GEORGE DOOLEY,
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [24]

*In the District Court for the Territory of Alaska,
Third Division.*

SPECIAL APRIL, 1913, TERM—MAY 6th—23d
Court Day—Tuesday.

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corp., KATALLA
COMPANY, a Corp.,

Defendants.

Trial.

Now, on this day, the trial of the above-entitled cause came on regularly for trial—E. E. Ritchie appearing as attorney for the plaintiff, R. J. Boryer, attorney for defendants, and both sides announcing their readiness for trial, the following were selected

and sworn as trial jurors to try the issues in this cause:

- | | |
|---|--------------------|
| 1. A. S. Jensen, | 6. C. H. Golden, |
| 2. J. L. King, | 7. L. C. Townsend, |
| 3. J. E. Currier, | 8. Geo. Brown, |
| 4. Joseph Lee, | 9. L. H. Pederson, |
| 5. E. F. Bell, | 10. Smith Higgins, |
| 12. J. M. Daugherty. and 11. Karl Long. | |

WHEREUPON opening statements were made by both attorney for plaintiff and attorney for defendants.

WHEREUPON James Heney was sworn and testified in his own behalf.

WHEREUPON Plaintiff's Exhibit "A" was offered and admitted in evidence.

WHEREUPON W. H. Slimpert, Henry Edler, C. H. Leikets, J. W. Forrester, M. V. Lattin and Tom Scott were [25] sworn and testified as witnesses on behalf of the plaintiff.

THEREUPON plaintiff rests.

THEREUPON, the defendant Copper River and Northwestern Ry. Co. and the Katalla Company, by and through its attorney, R. J. Boryer, filed their written motion for a judgment of nonsuit, which said motion was by the Court denied, to which order and ruling of the Court defendant excepts and exception is allowed.

WHEREUPON J. W. Forrester was recalled and testified as a witness on behalf of the defendants.

THEREUPON defendant rests.

WHEREUPON, it being the hour of adjournment, the further trial of the above-entitled cause is continued until to-morrow at the hour of ten o'clock A. M.

Entered Court Journal No. 2, page No. 87. [26]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN
RAILWAY COMPANY, a Corporation, and
THE KATALLA COMPANY, a Corpora-
tion,

Defendants.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard at Cordova, Alaska, on the 6th day of May, 1913, at 10 o'clock A. M., before the Honorable PETER D. OVERFIELD, Judge of said court and a jury:

The plaintiff herein being represented by his attorney and counsel, E. E. Ritchie, Esq.

The defendants herein being represented by their attorney and counsel, R. J. Boryer, Esq.

Opening statements were made to the Court and Jury by Mr. Ritchie in behalf of the plaintiff and by

Mr. Boryer in behalf of the defendants.

Whereupon the following additional proceedings were had and done: [27]

[Testimony of James Heney, in His Own Behalf.]

JAMES HENEY, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. James Heney.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you live? A. At McCarthy.

Q. Where were you living and working on January 19, 1912?

A. I was living in Chitina and working in the Chitina tunnel.

Q. How long had you been working there?

A. Pretty close to three months—two months and a half.

Q. What had you been doing in the tunnel during that time—what did you first do?

A. I was foreman there, getting the dirt out of the tunnel—that was the first job I got.

Q. What has been your business a good part of your adult life? A. I follow up mining.

Q. Hard rock mining? A. Yes, sir.

Q. Now, after you finished this job getting the dirt out of the tunnel, what did you do next?

A. Then we went out to the woods cutting logging.

Q. Getting the dirt out of the tunnel—you mean

(Testimony of James Heney.)

you were cleaning out the dirt and rock from the cave-in that occurred the summer before?

A. Yes, sir.

Q. After you finished the timber, when did you work in the tunnel again? [28*—2†]

A. We were out in the woods seven or eight days, I should judge, and came back again and started lagging up the tunnel.

Q. That was lagging up between the tunnel proper and the dirt sides?

A. Yes, sir, the sides of the tunnel.

Q. How long did you work at that?

A. I was working at that until I got hurt.

Q. How long before you were hurt had you been working there?

A. I guess about three weeks or a month, as far as I can judge.

Q. How long had you been working on top of this platform?

A. I couldn't exactly say. It must be two or three weeks working on top of the platform.

Q. Can you describe the interior of the tunnel in your own language so the jury can understand it?

A. I think I can.

Q. So as to explain the lagging work and the other work you did on top of the platform?

A. The tunnel sets, we put in new timber there and they were put some places three inches, down near

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of James Heney.)

the bottom, where we put in three-inch lagging and then it varied—as it went up it got wider and at the top of the tunnel it might be three feet or four feet in places, some places less, and we were lagging that and then at the top of this tunnel they raised another set, on top of that to catch the cave-in along at the back of the tunnel, and we had to lag that the same down along the side and along the top to catch up with that.

Q. Who were you working for there?

A. Mr. Forrester was engineer, I think, up there.

Q. From whom did you get your pay?

A. I think the Katalla Company. [29—3]

Q. On what road were you working?

A. The Copper River & Northwestern.

Q. That is the line of railroad that runs from Cordova to Chitina and beyond and through the Chitina tunnel? A. Yes, sir.

Q. You had been working inside the tunnel about how long would you say on that platform or around it?

A. On the top timbers I was working there about three weeks, I think, as near as I can guess.

Q. Describe this inner tunnel, the timber part of the tunnel, how high was it and what timbers was it constructed of and how wide was it?

A. The timbers were about—I guess a regular set of timbers must be 21 feet from the track up to the top and then up above there was—well, at the cave-in they varied from 12 ft. timbers to about 18, I should judge, in places, to catch up the back.

(Testimony of James Heney.)

Q. How wide was this platform you were working on?

A. It went right across the tunnel; about 18 or 20 ft., I think.

Q. During that time when you were working in the tunnel, how was the place lighted?

A. Sometimes it was lighted up pretty good.

Q. How was it lighted in the first place, describe the light.

Mr. BORYER.—We object to the introduction of any testimony except as to the light at the time of the injury.

Mr. RITCHIE.—It goes to the company's negligence.

Objection overruled. Defendant allowed an exception.

Q. Describe the way it was lighted.

A. We had carbide lights there—it threw very good lights; we could see all around the tunnel; in fact, we had two of [30—4] them part of the time and we had a couple of gasoline torches.

Q. Those carbide lights, what power were they, if you know?

A. I couldn't tell the power of them, but they threw a good light.

Q. How far would they throw light?

A. Two or three hundred feet.

Q. Would they light the tunnel?

A. Yes, they would light the tunnel.

Q. Describe them and how they were placed.

A. These carbide lights, they stood in a tank about

(Testimony of James Heney.)

that high (indicating). You put the carbide into a little tank and this tank is full of water, and there is a box in it and you put a light over it and put a match to it and it forms gas and lets the light through.

Q. That threw a very clear light?

A. That threw a very clear light.

Q. When these were in use in the tunnel how would the light in the tunnel compare with the ordinary well-lighted city street?

A. Yes, it was as good a light as you see in a city street.

Q. Did they take those lights away?

A. Yes, they took one of them away and they took the carbide they had for the other one down to the wreck with them.

Q. That was in what month?

A. In the month of January, 1912.

Q. They took them down to bridge 75A?

A. Where that rotary was hurt, yes.

Q. After they ceased to have the carbide lights, how did they light the tunnel?

A. We had some gasoline torches there. [31—5]

Q. Describe them.

A. It was a lamp you hang up on a post and there was a lot of holes in it. When you put a match to it it threw the light out, maybe five or six lights would spread out through the torch.

Q. How much light did they throw?

A. Quite a bit but not as much as the other.

Q. Did they make the tunnel comparatively light?

A. Not all over the tunnel; no.

(Testimony of James Heney.)

Q. How far could you see from those lights and see quite distinctly?

A. Twenty or twenty-five feet, probably.

Q. How long before you had this accident was it that they took those lights away?

A. I couldn't say exactly. I think they were gone four or five days.

Q. After that what lights did you have?

A. We used the gasoline torches and we ran out of gasoline and then we had only lanterns then, three lanterns.

Q. What kind of lanterns were those?

A. Small, little ordinary lanterns that you pack around when you are going out at night.

Q. Such as an individual carries with him to go home by? A. Yes, sir.

Q. You had been working solely by those lights for several days? A. By lanterns?

Q. Yes.

A. Yes; we had been working two or three days, that I know of.

Q. On this particular day when the accident happened how many [32—6] men were working on top of the platform?

A. Up where I was working?

Q. Yes.

A. There were four of us working there.

Q. Who were those men?

A. I don't know their names—Barry Slimpet was one and a fellow named Henry—I forget his other

(Testimony of James Heney.)

name—and a little fellow named Shorty, called Shorty.

Q. What was each of the men doing?

A. Shorty was taking the measurement of these post timbers or lagging we were putting in.

Q. Explain the work you were doing there that day.

A. These are the posts—there are four posts going along the top across the tunnel, the same as this one—they were four feet apart.

Q. Above the platform there is an upper structure to the tunnel? A. Yes, sir.

Q. And these posts you are speaking of are the upper structure? A. Yes, sir.

Q. Here is your platform and above that is another—

A. Yes, another set of timbers on top of the platform.

Q. And those timbers you were lagging between were the upper timbers on the platform?

A. Yes, sir.

Q. You may proceed.

A. I was putting in those pieces of 2 by 12 right in between the posts and the top of the tunnel.

Mr. RITCHIE.—With the consent of Mr. Boryer we will use these photographs (handing to witness).

The WITNESS.—Here is the tunnel here; here is the first set of [33—7] timbers in the tunnel and this is the caved-in part of it here; there is a platform up here, a platform up here on top of this tunnel. This is the first set of timbers; then this is the

(Testimony of James Heney.)

next set here, right here. This man was taking the measurements between these posts here. He measures them and the other two men cut them and I was putting them in their place.

Juror PEDERSEN.—What is the lagging you speak of?

A. We had to lag up here—here is the side; we had lagging—and there might be a space in between here and here 3 ft—it varied from two or three inches to three feet.

Q. Of what kind of timber were those lagging made?

A. Some 2 by 6 and 2 by 12 and all kinds of old junk picked up around the camps, and when we ran out of that we put in split lagging and round lagging that we cut in the woods.

Q. How long had you been working on that lagging between the posts?

A. I think it must be about a month, all told, since we started.

Q. This particular work you were doing that day?

A. We started there that morning on this particular work.

Q. During your previous work in the tunnel had they ever run trains through the tunnel?

A. Yes, sir.

Q. How often?

A. I think they ran a train nearly every day there back and forth.

Q. When those trains would come through the tunnel just state what effect it had and if it was dif-

(Testimony of James Heney.)

ferent at different times, state that.

A. Sometimes when a train would be coming through the tunnel [34—8] we would get orders from Mr. Forrester if he had any timbers to take in and we knew it was coming in, he would tell us to go out and take the timbers in and let the smoke go out. Sometimes we wouldn't have the timbers and it was awfully cold and it is warm up there, and we would be all wet from handling the lagging and timbers and our clothes would be all wet, and we would get stiffened up with the cold, get all froze up, and sometimes we would sooner stay up there than go down and get cold.

Q. I asked you what was the effect where a train would come through the tunnel, that is, as to smoke and gas, and was it always the same.

A. Some days a train would come through and there wouldn't be so much smoke and other times when they coaled up coming into the tunnel there would be an awful lot of smoke come up there and it was suffocating.

Q. You were working for Mr. Forrester—he was the engineer in charge? A. Yes, sir.

Q. Had you a foreman?

A. Yes, part of the time.

Q. Who was that?

A. Dan Lee was on there and Mr. Boyle was on.

Q. Had you any particular orders from Mr. Forrester or from your foreman as to what you were to do when a train or engine went through there and left smoke or gas in the tunnel? A. No, sir.

(Testimony of James Heney.)

Q. Was Mr. Forrester ever present when they did go through and tell you at those times what to do?

A. I couldn't say whether he was there or not.
[35—9]

Q. Did he ever give any orders to you direct or to any of the men which you ever heard?

A. No, not that I heard—he never gave any orders to me or any of the men that I heard.

Q. You stated that the smoke and gas were worse at times than others? A. Yes.

Q. Now, did it ever get so bad that it interfered with your work? A. Yes, sir.

Q. And at such times was the volume of smoke and gas more noticeable and more oppressive in some places than others, or was it uniform?

Mr. BORYER.—We object to that as leading.

Objection overruled. Defendant allowed an exception.

A. Yes; it was more at some places—where the floor would be tight the smoke wouldn't come up so quick or so fast through that, and other places maybe nine or ten feet away the smoke would come up there pretty bad.

Q. When the trains did go through leaving smoke, what did you do and if you did different things at different times, tell the jury what you did the different times.

A. When the train would go through, sometimes we would go down—if we had anything to do we would go down below and let the smoke go out, and if we didn't have nothing to do, we wouldn't go down

(Testimony of James Heney.)

but we would stay up there where it was warm.

Q. Now, on the particular day that you were there that this accident happened, you state there were four men working on the platform.

A. Yes, sir. [36—10]

Q. Was anybody working down below in the tunnel, on the ground floor?

A. I am not sure. There was one or two men down below; they were sending up the lagging to us.

Q. Was there any foreman?

A. No, not that day—Mr. Forrester came around in the morning and gave us our orders.

Q. Mr. Forrester was in town that day?

A. Yes, sir.

Q. And gave you orders that day, that morning?

A. Yes, sir.

Q. You had no foreman with you that day?

A. No, sir.

Q. Had you a foreman the previous day?

A. Yes, sir.

Q. Who was the foreman?

A. I think George Hayes was giving us orders the previous day.

Q. Describe this hole to the jury.

A. There was a gap left right across the tunnel, between the new tunnel that we were putting up and the old tunnel that had fallen down—there was a gap of 6 feet wide left in the tunnel.

Q. Six feet of the linear projection of the tunnel?

A. Yes, sir.

Q. And how long was it across the tunnel?

(Testimony of James Heney.)

A. It went right across the tunnel—it must be 20 feet wide, I guess.

Q. Was that hole visible or otherwise when they had the bright lights?

A. Yes, it was visible when we had those lights.
[37—11]

Q. Could easily be seen?

A. Could easily be seen.

Q. And after you got down to small hand lanterns, how was it?

A. You couldn't see it unless you walked along with a lantern in your hand.

Q. When the tunnel would get full of smoke after you had gotten down to hand lanterns how well could you see?

A. You couldn't see hardly anything only in places—you might see a place where the floor would be lagged tight and the smoke couldn't come up so bad through there.

Q. If you held your lantern out extended in your hand before you, how far could you see?

A. You couldn't see any distance at all ahead of you with the lantern when the smoke was thick.

Q. Where the smoke was coming up could you see the floor with your lantern, when you held it up?

A. No, sir.

Q. After they took away the large lights and you had only lanterns, was there any light to indicate the location of this hole? A. No, sir.

Q. Did they put any guard rail around it?

A. No, sir.

(Testimony of James Heney.)

Q. Anything to indicate it at all?

A. Not a thing.

Q. Then coming to the hole, unless a man had a light before him, would there be anything to indicate to him that he had come to the hole?

Mr. BORYER.—We object to that.

Objection overruled and defendant allowed an exception.

A. Nothing at all. [38—12]

Q. Tell what happened on this afternoon—the last few minutes before this train came through, what were you doing and what happened after the train came through. Did any train come through that afternoon, the 19th of January, 1912?

A. Yes, sir.

Q. Tell what you were doing when the train came in.

A. We were putting in this filling between the timbers and the train came into the tunnel and blew before it came into the tunnel; we were quite a distance away from where the ladder was.

Q. To go back. How did you get up to the platform when you went up to work?

A. We got up by a ladder on the side of the tunnel.

Q. Where was the ladder located?

A. On the east end of the tunnel.

Q. Describe that tunnel, the length of it, that is, the timbered part of it and the approaches to it.

A. The cave-in?

Q. I want you to describe the whole tunnel, in-

(Testimony of James Heney.)

cluding the open approaches to it—where does it start from with relation to the town of Chitina?

A. It starts from Chitina going east—an open cut going in for a distance of about, I guess, 300 ft., as near as I can judge before they start this tunnel. Then they start in timbering and about five or six hundred feet of the tunnel there is timbered.

Q. The town of Chitina is at the west end of the tunnel?

A. The town of Chitina is at the west end of the tunnel.

Q. And the tunnel runs nearly east?

A. Yes, east and west.

Q. After you get through the tunnel proper what is on the east end of it toward the Copper River?
[39—13]

A. There is another cut on the east end of the tunnel.

Q. Just describe the track for half a mile or so from the east end of the tunnel, that is, running towards the river.

A. Well, as you come out from the mouth of the tunnel, the track is on a curve—

Q. Which way?

A. As you go east towards the Copper River.

Q. Which way does it curve, right or left?

A. It curves to the left.

Q. Coming this way, coming along the bank of the Copper River?

A. Yes, sir. And there is an awful grade until

(Testimony of James Heney.)

you get down to pretty near the bridge, the Copper River.

Q. How far is the bridge from the easterly end of the tunnel?

A. I should judge about a quarter of a mile, a little better maybe.

Q. Do you know the grade coming up that hill from the Copper River bridge?

A. I couldn't say exactly the grade—it is a very heavy grade coming up there.

Q. Whereabouts was the ladder located upon which you climbed to the top of the platform to go to work?

A. The cave-in was in the center of the tunnel, pretty near the center, and the ladder was about middle ways or a little more or better going to the east than middle ways, in the side of the tunnel.

Q. And how far was that ladder from where you were working at the time the train came through?

A. I should judge 50 or 75 ft.

Q. Towards the Copper River end?

A. Yes, sir.

Q. That was an ordinary ladder against the side of the tunnel? [40—14] A. Yes, sir.

Q. And you climbed that ladder—now, what sort of a hole was there in the platform for you to go through?

A. There was a hole left there between the flooring and the side of the timbers, this lagging we put in.

Q. How far was that hole from the one you fell through later?

(Testimony of James Heney.)

A. It must be 100 ft., I guess, as near as I can judge.

Q. The hole you fell through was toward the Chitina end? A. Yes, sir.

Q. And you were working between those two places?

A. We were working between those two places.

Q. How far away from the hole you fell through?

A. I forget now about how many sets of timbers we had put in—I think seven or eight sets we had put in.

Q. That would be how many feet?

A. About 25 or 30 feet, I would say.

Q. What were you doing when the train came in—working at this job you have described?

A. Yes, I was working at that job.

Q. Go ahead and tell the jury in your own language what happened.

A. Well, right where we started to put in this lagging, this fellow was taking the measurements and he didn't take the exact measurements right; some were a little long and more of them were too short, and three pieces there we didn't get the right length of, and there was one piece, the piece alongside the hole, he left out, and we got a ways ahead and then he went back and took the measurement of this piece, just before the train came through, and right as the train was passing by, he came to me and said, "Jimmy, I have been [41—15] back there now and took the measurements and you had better go back there and put them in," and I said, "All right," and the smoke

(Testimony of James Heney.)

was coming up pretty thick where we were working—

Q. This was about the time the train came in?

A. Yes, sir.

Q. Describe the approach of the train, its passage through the tunnel, and tell when you first noticed it and tell about the train going through the tunnel.

A. When we first noticed the train we were working about 20 ft. away from this place where I fell off—at the time the train first came through the tunnel; and the train blew the whistle at the mouth of the tunnel and came rushing in and the smoke came up through the floor and smothered that place up so it was something fierce up there.

Q. Had you any notice of the train before it whistled at the mouth of the tunnel?

A. No, sir. And then I went over and was going over to this place where I was working and put in this piece and the smoke was so densely thick and suffocating that I walked into the hole.

Q. When you walked away from where you were working, what were you doing, what was your intention? A. To go back and put in this lagging.

Q. Could you see?

A. Well, I could see places in the floor where the smoke wasn't coming up quite as thick as where we were standing.

Q. When you were walking along there, were you carrying anything?

A. A lantern and hammer—I wouldn't say exactly whether I had the hammer with me or not, but I must have had because I [42—16] couldn't put the

(Testimony of James Heney.)

lagging in without a hammer and I was working at the other place.

Q. What had been the effect of the smoke and gas upon you—what was your condition as to being able to notice any one around you?

A. I was in pretty bad condition with the smoke—could hardly breathe, it was coming up so thick—it was suffocating.

Q. How much could you see as you walked along with the lantern in your hand?

A. You couldn't see anything at all, hardly.

Q. What happened to you then?

A. I was groping along, going back looking for the place where I was going to work, and I walked into this hole. The smoke was coming up so thick and I had the lantern in my hand but I couldn't see the hole.

Q. What happened after that?

A. I don't know—I got knocked out. I fell into the hole.

Q. When were you next conscious?

A. I don't know how long I was down there. The next I knew I was outside of the tunnel and they were sending for a stretcher for me.

Q. When you were outside of the tunnel what were you doing and what position were you in and who was there? A. There was Chris Likits there.

Q. Do you know how you got outside of the tunnel?

A. No, sir. I was lying on the middle of the track in the snow when they came with a bunk; they were going to use it for a stretcher, and they put me in the bunk and when they went to lift me up, I couldn't

(Testimony of James Heney.)

stand the pain in my leg and I said, "I will try to put my arms around your neck and let you pack me,"—I couldn't stand the bunk when I was put in [43—17] there, and they got under me and packed me home.

Q. Who carried you home?

A. Chris Likits and the blacksmith—I don't know the blacksmith's name—and Mr. Slimpet helped pack me.

Q. After they took you home, they put you in bed there? A. Yes, sir.

Q. And who came to see you?

A. Mr. Forrester came and they sent for a doctor.

Q. Who was the doctor? A. Dr. Thom.

Q. He was a physician there at Chitina?

A. Yes, sir.

Q. Did he make an examination of you?

A. Yes, sir.

Q. Now, describe your injuries, from your own knowledge of them, and from what the doctor told you.

A. From what they told me my leg was twisted right around—my left leg was twisted right around.

Q. What part of it was twisted and where if at all was there any injury?

A. This part here, this hip here, was thrown out of its socket and was twisted right around.

Q. Was it dislocated?

A. Dislocated—and I was suffering some awful pain, and they gave me some chloroform and got some more men around there to help them hold me down until he set the leg.

(Testimony of James Heney.)

Q. Was there any other injuries besides this to your hip?

A. My back bothered me for a long time but does not bother me so much now.

Q. In what way did it bother you? [44—18]

A. When I walked it would snap and hurt me.

Q. Was there any bones broken? A. No.

Q. Just the dislocation and the pain in your back?

A. Yes, sir.

Q. How long did you lay in the house in bed?

A. About six weeks I laid in bed.

Q. Did any other physician attend you during that time?

A. Yes, Doctor Council came up on the next train.

Q. The next train after you were hurt?

A. Yes, sir.

Q. What did Doctor Council do and what did he say?

A. He looked at me,—he examined me and said I was all right.

Q. What did he mean by that?

A. He said that the leg was set all right.

Q. How long did Doctor Council attend you?

A. Well, he came up on that train and went down on the next one.

Q. Did he attend you any during the time that you were confined to your bed after that?

A. He came up off and on and gave my wife orders—told her what to do.

Q. You remained in bed about six weeks?

A. Yes, sir, I remained in bed about six weeks.

(Testimony of James Heney.)

Q. And after that, what pain, if any, did you suffer and what effect did your injury have upon you?

A. For three weeks my bowels never moved unless my wife would give me an injection—my bowels were swelled up and wouldn't move, and I had to have an injection, with about a gallon of water, until my bowels would move.

Q. That was while you were in bed? [45—19]

A. That was while I was in bed.

Q. Did you suffer any pain during that time?

A. Yes, sir—I would have a little cough in the morning. I would sleep a couple of hours in the night and the most pain I would suffer would be trying to get that little cough up in the morning.

Q. After you got out of bed, after the six weeks, did you go at once out of the house? A. No.

Q. How long before you were able to go out of the house?

A. There was snow and ice and I couldn't go out very well—I would go out as far as the door.

Q. How did you walk? A. With crutches.

Q. How long did you use crutches?

A. I used them until some time in July—I used them quite a long time; then the last month or six weeks—then I used only one.

Q. During this time that you were going about on crutches, what was your condition as to suffering any pain?

A. I had to walk very slowly with my hip or it would hurt me all the time—in fact it hurts me to-day. From the day my hip got hurt it aches me,

(Testimony of James Heney.)

right until to-day—now it is aching me.

Q. When you were on crutches, could you raise your weight on that hip? A. No, sir.

Q. And during those months did you suffer any pain in your hip and back?

A. Yes, sir. [46—20]

Q. Much or little?

A. I was suffering right along with it.

Q. How long was it before you ceased to suffer much pain?

A. About in the middle of July or middle of June I could go along very well with one crutch and lean upon my leg quite a lot.

Q. After you threw away your crutches did you go to work? A. No, sir.

Q. When did you go to work or attempt to go to work?

A. The latter part or the end of June, Mr. Curry sent for me, that he had a contract.

Q. Who is Mr. Curry?

A. Mr. Gray's assayer, I think, out at the Copper Mountain. He had a contract and I worked up there for him before and he send for me, *though* I might be able to do this contract.

Q. What was the work? A. It is a tunnel.

Q. A tunnel in a mine? A. Yes, sir.

Q. Did you go up there?

A. Yes, I went up there.

Q. What did you do?

A. When I got up there, I got up to the tunnel. It took me a long time to climb up the hill. I could

(Testimony of James Heney.)

climb up better than I could come down—coming down it was steep and I couldn't put the heft of my body on my leg.

Q. After you got up there, did you do anything about the contract? A. No, sir.

Q. Did you start?

A. I didn't start; no. [47—21]

Q. Why not?

A. Well, I wouldn't be able to walk up, from the camp up to the tunnel and down again,—it would take me nearly all day to walk up and down,—I wouldn't be able to do any work when I got up there.

Q. You saw you couldn't do it? A. Yes, sir.

Q. Was it a good contract or otherwise?

A. The man who took it after me made \$12.50 a day.

Q. For how many days?

A. I think it was a \$1,200 contract.

Q. Then you went back to Chitina?

A. No, I went back to 158.

Q. What did you do there?

A. I stayed there with my wife and she was doing the cooking for the railroad.

Q. Your wife was cooking there for the railroad?

A. Yes, sir.

Q. Did you assist her?

A. Yes, I helped wash dishes around there.

Q. When did you first go to work after that? After the work you did at 158—have you had any regular employment since?

A. No, never had any regular employment since.

(Testimony of James Heney.)

Q. What did you do after that—after you left 158?

A. Came back to Chitina and then I stayed there in Chitina until last December and we made up our mind then to go to McCarthy and start a restaurant; we were not doing anything at Chitina and I wasn't able to work.

Q. McCarthy—that is near the end of the railroad line?

A. Yes, sir; and we started a little restaurant up at McCarthy.

Q. And you have been running that since?
[48—22]

A. Yes, sir.

Q. And what have you done about it?

A. I hauled water all winter with the dogs and chopped wood and sawed it.

Q. Have you done any other work than that?

A. I put up a building there—had men hired to do the heavy work for me.

Q. Have you done any heavy work since you were hurt? A. No, sir.

Q. Are you able to do any heavy work?

A. No, sir.

Q. Why not?

A. My hip is not strong enough yet.

Q. How about your back?

A. My back is not bothering me as much as my hip is.

Q. Can you lift heavy weights? A. No, sir.

Q. Can you lift ordinary weights?

A. Yes, I can lift a pretty good weight.

(Testimony of James Heney.)

Q. But not heavy weights that will cause a strain?

A. No, sir.

Q. You testified in the beginning that your occupation has been that of a hardrock miner a good part of your life? A. Yes, sir.

Q. How old are you? A. 38.

Q. You were 37 when hurt? A. Yes, sir.

Q. How long were you a miner?

A. Off and on for the last sixteen or seventeen years.

Q. Whereabouts? [49—22½]

A. I mined in Butte quite a long time and worked up in British Columbia a while.

Q. How long have you been in Alaska?

A. Came up to Alaska in 1910.

Q. And what were you doing after 1910, until you got this job?

A. I started at Teikell.

Q. Who were you working for?

A. I was working on the railroad.

Q. You were working mostly on the railroad up to the time that this accident happened?

A. No, I worked a month there in 1910 and then went to Chitina, took my wife and family to Chitina, went up there on a boat and I located there and I cleared off some of the townsite, and then I went up to Kuskolina to do some assessment work up there for Mr. McConnell.

Q. What wages were you drawing from the Katalla Company at the time you were hurt?

A. Fifty cents an hour.

(Testimony of James Heney.)

Q. How many hours were you working a day?

A. Ten hours.

Q. You drew \$5.00 a day? A. Yes, sir.

Q. What wages have you generally been getting, when you worked for the railroad or the Townsite Company during the three years you have been in Alaska?

A. With the Townsite Co. I cleaned up \$10.50 a day.

Q. What wages did you usually draw when you were working for wages?

A. \$125, I got when I worked for Jim McConnell—from \$100 to 125, a month and board. [50—23]

Q. Are you able to do the work of a miner?

A. No, sir.

Q. Or carpenter work generally? A. No, sir.

Q. On account of these injuries?

A. Yes, sir, on account of these injuries.

Q. From what the doctors have told you and from what you know of your own injuries, do you believe you will ever be able to work as a hard rock miner again? A. I don't believe I will.

Q. Describe your physical condition now to the jury.

A. For the reason that I know I can't work in the mine. It is very rough and I would have to walk over rough places. I am all right in a place that is level but when I get into a rough place, the least little twist I give I fall over on that side.

Q. When you walk, can you walk perfectly as you did before? A. No, I am lame.

(Testimony of James Heney.)

Q. On what account? A. On account of my hip.

Q. Left hip? A. Yes, sir.

Q. You walk with a limp in your left leg?

A. Yes, sir.

Q. Do you suffer any pain from your hip?

A. Yes, sir.

Q. Is it constant or otherwise?

A. There is a constant pain in here, in my hip—a kind of drawn pain all the time in here.

Q. Do you suffer any pain in your back now?

A. Not much, no. Once in a while my back may snap a little. [51—24]

Q. You are pretty well over it? A. Yes, sir.

Mr. RITCHIE.—That is all.

(At 11:15 court took a recess for ten minutes.)

Court reconvened at 11:25.

Cross-examination.

(By Mr. BORYER.)

Q. You say you came to Alaska in 1910. For whom were you working in 1910?

A. I worked at Teikell.

Q. What were you doing at Teikell?

A. I was foreman there on a job.

Q. Did you work on the Copper River & Northwestern? A. Yes, sir.

Q. For whom? A. For Mr. Heney.

Q. Mr. Heney paid you, did he? A. Yes.

Q. And you were working for him?

A. Yes, sir.

Q. When you say you were working on the Copper River & Northwestern you mean that you were work-

(Testimony of James Heney.)

ing on the line of railroad that begins at Cordova and extends to the Kennecott mines? A. Yes, sir.

Mr. RITCHIE.—You are referring to the last employment?

Mr. BORYER.—I am referring to this particular time.

Q. You stated in your direct examination that you were working on the Copper River & Northwestern railroad. You mean that you were working on the line of railroad that extends from Cordova to the Kennecott mines, 196 miles?

A. Yes, sir. [52—25]

Q. At the time you were injured you were working on this same railroad? A. Yes, sir.

Q. And that is what you mean by saying that you were working for the Copper River & Northwestern Railroad? A. Yes, sir.

Q. You were drawing your salary from the Katalla Company, were you not?

A. I had the Katalla Company's check.

Q. Mr. Lee, your foreman, was working for the Katalla Company at that time?

A. I should think he was.

Q. Mr. Forrester was working for the Katalla Company at that time, was he not? A. Yes, sir.

Mr. RITCHIE.—If you know, of your own knowledge.

A. Well, I couldn't say whether the Copper River & Northwestern Railway Company or the Katalla Company—I couldn't tell at that time.

Q. In regard to Mr. Forrester or Mr. Lee?

(Testimony of James Heney.)

A. No. They were working there the same place I was working.

Q. You were doing construction work, were you?

A. Yes, sir.

Q. You worked for Mr. Heney how long?

A. A month.

Q. Did you begin working for him as soon as you came up here?

A. No, sir, I staid in Cordova about three weeks.

Q. What did you do in Cordova?

A. I stayed up here in one of Joe Diggs' houses.

Q. Did you do any work? A. No, sir. [53—26]

Q. Then the first work you did was for Mr. Heney and how long did you work for Heney?

A. A month.

Q. Then where did you go? A. To Chitina.

Q. What did you do at Chitina?

A. I cleaned off a part of the townsite there.

Q. That was owned by the Katalla Company?

A. I couldn't say who owned it.

Q. You took a contract from Mr. Exum there?

A. No, I took a contract from Mike Sullivan.

Q. He was working for the Katalla Company?

A. I couldn't say who he was working for.

Q. How long did you work on that job?

A. About ten or twelve days.

Q. What were you doing?

A. Clearing off a block of ground.

Q. Who else was working with you at that time?

A. A fellow named Jeru.

Q. And who else?

(Testimony of James Heney.)

A. And I had my brother working there—we put two men to work.

Q. Where is your brother now?

A. I couldn't tell you.

Q. Do you know where Jeru is? A. No, sir.

Q. Then after you had completed that piece of work, where did you go to work?

A. I went to work for myself then.

Q. Day labor? A. Putting up a cabin.

Q. Where did you put up this cabin? [54—27]

A. Chitina Heights.

Q. How long was it before you next went to work?

A. I had the cabin up and the dirt pretty near on when I went to work for McConnell and Deyo up the Kuskolina.

Q. How long did you work up there?

A. I worked there for two months.

Q. What kind of work were you doing?

A. Mining.

Q. Then you quit work there did you?

A. Yes, we got through there.

Q. Then where did you next start to work?

A. I next started to work—when I came back I went to work I think the other side of the Copper River doing some cribbing work.

Q. Railroad work was it? A. Yes, sir.

Q. Where was this cribbing work being done?

A. I couldn't say whether it was that year I did the cribbing work or the next year—I don't recollect now whether it was that year or the next year that I did that cribbing work.

(Testimony of James Heney.)

Q. On the Copper River?

A. Yes, sir,—that winter I worked on the section for Mr. Palmer.

Q. You mean on a section of the railroad?

A. Yes, sir, at Chitina.

Q. While you were doing this cribbing work, were you drawing carpenter's pay? A. Yes, sir.

Q. Working as a carpenter?

A. Working in the woods.

Q. When did you start working again, after you had finished this cribbing job and this work on the section? [55—28]

A. I started on the section—started to work again in April and worked for Gray in the Copper Mountain. That would be 1911.

Q. How long did you work for Gray?

A. A month.

Q. When you came back what work did you start doing?

A. When I quit Gray I went to work for George Davis up the Kuskolina.

Q. What doing? A. Mining.

Q. How long did you work for him?

A. Another month.

Q. Then when you got through with that work, where did you start working?

A. I worked for Jim McConnell.

Q. How long were you working there?

A. July and August and part of September, 1911.

Q. Then where did you start working?

A. At home.

(Testimony of James Heney.)

Q. What were you doing at home?

A. Sawing wood.

Q. That is at Chitina? A. Yes, sir.

Q. When did you next start to work?

A. I started in in the tunnel.

Q. The next work was the tunnel work?

A. Yes, sir.

Q. Now, while you were working on the section, what pay were you drawing?

A. I was drawing 35 cts an hour.

Q. \$3.50 a day? A. Yes, sir. [56—29]

Q. Out of that you paid what board?

A. I don't know. I was boarding at home.

Q. You were charged one dollar a day for board?

A. Yes, sir.

Q. And you paid how much for hospital fees?

A. \$1.50 was kept out for hospital.

Q. That is per month?

A. \$1.50 a month; yes.

Q. Then you started to work in the tunnel. Did you draw a carpenter's pay while you were working in the tunnel? A. Yes, sir.

Q. You were working as a carpenter, were you?

A. Yes, sir.

Q. And how long did you say you had worked on this section?

A. I worked there—I started in November, sometime, and worked there until about February, I think.

Q. Had you ever done any railroad work before that? A. No, sir.

Q. You had worked for Heney?

(Testimony of James Heney.)

A. Yes, I had worked for Heney but not before I came to Alaska—I never done no railroad work.

Q. Any carpenter work—had you done that?

A. Very little—what I done for myself.

Q. When did you say you began working in this tunnel?

A. I began working there in November, 1911.

Q. And you were injured in January, 1912?

A. Yes, sir.

Q. What was your general work in that tunnel—what were you doing?

A. When I started in there first I was foreman getting out the dirt that caved in. [57—30]

Q. There had been an accident at this tunnel, had there not? A. Yes, sir.

Q. And the tunnel was closed up? A. Yes, sir.

Q. So the trains couldn't run through?

A. Yes, sir.

Q. Weren't you retimbering and strengthening this tunnel? A. Yes, sir.

Q. That was the work that you began at?

A. Yes, sir.

Q. At the time that you began in November?

A. When I started in November I went to take out the dirt out of the tunnel.

Q. Then you began as a foreman doing the work?

A. Taking out the dirt.

Q. That had fallen in this cave-in of the tunnel?

A. Yes, sir.

Q. Now, then, how long did you work at taking out this dirt?

(Testimony of James Heney.)

A. I couldn't exactly say the time,—about a month, I guess, as near as I can tell. It might be more or less.

Q. Had you been a foreman on the railroad work before that? A. I was foreman for Heney.

Q. Drawing foreman's pay? A. Yes, sir.

Q. From Heney? A. Yes, sir.

Q. And at the time that you were working on the tunnel as foreman you were drawing foreman's pay from the Katalla Co? A. Yes, sir.

Q. You were working about a month taking out the muck and dirt? A. Yes, sir. [58—31]

Q. Why were you taking out this muck and dirt?

A. To get ready to put in some timbers, I guess.

Q. Then after you had worked there this month as foreman taking out this muck, what was your next work in that tunnel?

A. The next work, we went to lagging the tunnel, put in some lagging.

Q. Explain to the jury what you mean by lagging.

A. I was filling up between the timbers and the side of the wall—there was a space between them that I was filling up with this filling and lagging.

Q. In other words, the framework of the tunnel is more or less regular? A. Yes, sir.

Q. And your lagging on the side—you were putting in lagging to fill in the space between the tunnel and the roof; is that correct? A. Yes, sir.

Q. That is true over the top of the tunnel—that is, if the framework of your tunnel happens to be a foot or half a foot or two feet from the top of your

(Testimony of James Heney.)

tunnel, you fill in above that so as to fill the space in between the top of the tunnel and the roof?

A. Yes, we started at the bottom; we lagged up along the side with the first set of timbers and when we got through with that we went back to the other side and done the same thing and lagged across the top of the tunnel.

Q. You lagged up on each side of the tunnel behind the timbers and between the timbers and the roof and then lagged up over the tunnel?

A. Yes, sir.

Q. How long had you been working at that?
[59—32]

A. Well, about a month, I think, as near as I can tell.

Q. Where did you get this lagging?

A. Part of it was hauled in there—it was old timbers, plank and ten by tens and such stuff as that—was hauled in there with the train and there was some more of it cut out in the woods.

Q. Who cut it out in the woods?

A. I have been out there cutting it in the woods.

Q. In other words the lagging is what you might call filling? A. Yes, sir.

Q. Now, what was your next work after this lagging work?

A. We were putting in those braces—the next work we done was putting in those braces between the timbers.

Q. Putting in the braces between the timbers?

A. Yes, sir.

(Testimony of James Heney.)

Q. You had worked on this tunnel practically all the time that it was being reconstructed and retimbered, were you not? A. Yes, sir.

Q. You assisted in doing all of the retimbering and restrengthening of the tunnel, did you not?

A. I didn't do much of that timbering.

Q. You worked there on the timbering work—were you not filling in? A. Yes, sir.

Q. And helping with the timbering?

A. Yes, sir.

Q. You had retimbered this tunnel, all, with the exception of about 6 ft., had you not?

A. Yes, I think there was a little piece on each end that was not finished there, too.

Q. You began retimbering this tunnel at what is known as the [60—33] east end, did you not?

A. I think so; yes.

Q. That would be the end towards the Kennecott mine? A. Yes, sir.

Q. And you were timbering towards the west end, towards Chitina? A. Yes, sir.

Q. Now, then, you had retimbered this tunnel up to within about say 6 to 10 ft. from the end, had you not, toward Chitina?

A. Yes, sir—there was about 8 or 9 bents of old timber that was left in there.

Q. That is on the Chitina end?

A. That is on the Chitina end.

Q. Then you were within about 6 or 8 ft. from meeting at that point? A. Yes, sir.

Q. Now, you say there was a top floor to the

(Testimony of James Heney.)

tunnel? A. Yes, sir.

Q. And you were working on that top floor?

A. Yes, sir.

Mr. RITCHIE.—I have here a postal card which might be used in the way of illustration. It is marked Plaintiff's Exhibit "A."

Q. I will ask you to look at Plaintiff's Exhibit "A" and ask you to show to the jury what you mean by the upper floor of the tunnel.

A. That is the regular tunnel here—the cave-in here (indicating.)

Q. Just answer my question: What do you call the upper floor of the tunnel?

A. This is the upper floor right here on top here.
[61—34]

Q. The other portion is the lower floor, is it not, below that? A. It is right down here.

Q. Right where the track runs? A. Yes.

Q. What did you have on the floor of the upper portion of the tunnel? A. We had lagging.

Q. Across your tunnel?

A. We had a flooring on that, we had a flooring on there.

Q. You had a flooring that extended clear back to the other end of the tunnel? A. Yes.

Q. The face of that picture shows the end toward Chitina, does it not?

A. I couldn't say whether that shows the end toward Chitina or not, but that is the way the timber is in the tunnel.

Q. I will ask you to look at that derrick there in front and ask you if you do not recall that there was

(Testimony of James Heney.)

a derrick there at the time that you were working there. A. Yes, sir.

Q. I will ask you if that derrick was not there on the day that you were injured.

A. Which place do you mean?

Q. At the point where you fell down?

A. No, sir.

Q. I don't think you understand my question. Wasn't it on the face of the tunnel?

A. This derrick here was used for raising the timbers and I think was on the east end of the tunnel.

Q. What end is that?

A. Next to the Copper River. [62—35]

Q. And there wasn't any on the west end there?

A. Not that I know of.

Q. Think for a moment and see whether you recall any derrick there?

A. No, I can't recall any derrick there.

Q. You swear there wasn't any derrick there?

A. I wouldn't swear to it—it may be but I can't recall it.

By the COURT.—At what point?

Mr. BORYER.—At the west end of the tunnel.

Q. Does that look to you like a picture of the west end of the tunnel? A. Yes, sir.

Q. And you think that is the west end of the tunnel?

A. That I couldn't say, that it is the west end of the tunnel.

Q. You had seen the west end of the tunnel?

A. Yes, sir.

(Testimony of James Heney.)

Q. Don't you think from having seen it that you would recognize it?

A. Well, there isn't much difference in the timbers between the west end and the east end.

Q. You had seen that end often, the west end?

A. Yes, I had seen it several times.

Q. You had seen it there every day when you were working there?

A. Yes, when we were packing timbers.

Q. At the west end? A. All over the top.

Q. I think we are getting confused. You stated a while ago that you didn't think there was a derrick at the west end. Now, I will ask you whether you have changed your mind and do you now recall if there was a derrick at the west end.

A. Well, I couldn't recall whether it was there the day I got [63—36] hurt.

Q. Was it there the day before?

A. I couldn't tell.

Q. Had you ever seen it there?

A. The derrick was used there in putting up these timbers.

Q. As you put up a bent,—you would use that derrick for the purpose of pulling up the bent?

A. Yes, sir.

Q. How did you pull up that last bent?

A. I didn't pull up the last bent—I had nothing to do with pulling up those bents.

Q. How was it pulled up?

A. I guess by a derrick.

Q. Do you know whether it was or not?

(Testimony of James Heney.)

A. I don't know—they pulled them up on the floor, hoisted them up with a derrick.

Q. Did you see them pull that last bent up?

A. No, sir.

Q. Then you don't know whether there was a derrick there or not—you wouldn't say for certain?

A. I wouldn't say for certain whether that derrick was there the day I was hurt or not.

Q. What time in the day were you hurt?

A. Some time in the afternoon.

Q. Now, then, that bent was up there then?

A. This bent here? Yes, sir.

Q. Are you certain of that? A. Yes, sir.

Q. Did you see it there? A. Yes, sir.

Q. Did you see it the day you were hurt? [64—
37] A. Yes, sir.

Q. How close were you to it?

A. Right alongside of it.

Q. Had you been alongside of it more than once?

A. I worked around it all that forenoon.

Q. Are you certain there was no railing there that forenoon? A. Yes, sir.

Q. You are certain of that? A. Yes, sir.

Q. You would have seen it if there was a railing there that morning? A. Yes, sir.

Q. And you say there wasn't a railing along there?

A. Yes, sir.

Q. You are positive of that? A. Yes, sir.

Q. You are positive you noticed that there wasn't any railing? A. Yes, sir.

Q. Are you certain there wasn't a railing on there the day before? A. Yes, sir.

(Testimony of James Heney.)

Q. You are positive of that? A. Yes, sir.

Q. How do you know there wasn't?

A. I should see it.

Q. Were you working around there?

A. Yes, sir.

Q. And you would have seen it if it had been there?

A. Yes, sir.

Q. And you didn't see it? [65—38]

A. No, sir.

Q. There was nothing to obstruct your view, so you could see whether there was a railing there or not?

A. No, sir.

Q. Do you know whether there was a railing there before that? A. No, sir.

Q. Did you ever put any lanterns there?

A. No, sir.

Q. Why didn't you?

A. Some of the rest of them would put a lantern there. I had no occasion to put it on—there was a lantern around these holes all the time.

Q. They would put them there before you got there; is that the reason?

A. One man is enough to put them there.

Q. If somebody hadn't put them there, would you have put them there? A. I guess I would.

Q. Why would you put them there?

A. I got orders to leave a lantern there any time that we would leave the hole.

Q. If you hadn't had orders and you didn't put a top over it—would you put a lantern there anyway?

A. It would be very dangerous if there wasn't

(Testimony of James Heney.)

a lantern there or covered over.

Q. Then you think you would put a lantern there to protect it? A. Yes, sir.

Q. You think it would have been your duty to have done it? A. I think it would.

Q. You were doing general work there, were you not? A. Yes, sir. [66—39]

Q. You think, now, if you put a lantern there that you could have seen it, so people wouldn't fall down?

A. Yes, sir.

Q. Although a train was coming through?

A. Yes, if there was a lantern there I think a man could distinguish the light when he got close to it, when the train came through.

Q. Do you think you could on this day when you were hurt and the smoke came through that time?

A. How is that?

Q. Do you think you could on the day you were injured, with the smoke in the tunnel the train had left, at the time you were injured?

A. I had one in my hand that time.

Q. Do you think you could have seen a lantern there? A. I think I could.

Q. And you think you could have seen a lantern at any other portion of the tunnel the same as you would at the hatchway?

A. Yes, when you get close enough to it.

Q. And you think if there had been a lantern at any portion of the tunnel, that altho the train was going through and had left the smoke in there that you described, that you could have seen it?

(Testimony of James Heney.)

A. No, not until you got close to it.

Q. But when you did get close to it you think you could have seen it? A. Yes, sir.

Q. Do you think you could have seen it a sufficient distance away so as to keep from falling down the hatchway? A. Yes, sir.

Q. How many men do you say were working there? [67—40] A. Four men.

Q. You were all doing the general work of retimbering and restrengthening this tunnel, were you?

A. Yes, sir.

Q. You were all four carpenters, were you?

A. Yes, sir.

Q. Now, then this top floor up to the point or place where you were injured, was all floored over?

A. Yes, sir, only this place where I was putting in this piece—this space between the timbers, that was left open.

Q. That wasn't lagging that you were putting in at the time?

A. I don't know what you call it. I call it lagging—that is what we call it in the mines, lagging.

Q. It was a brace, wasn't it?

A. It was put in there to close up the floor tight; in fact, I think it was put in there to help put the top set of timbers in place, in case any weight came on them.

Q. You had floored the top of your tunnel and between the posts—you hadn't sawed your board to fit between the posts? A. Yes, sir.

Q. And it was this that you were doing, wasn't it?

(Testimony of James Heney.)

A. Yes, sir.

Q. Then that would be more of a brace or would it be just a continuation of the floor being completed?

A. Yes, you could use it for a brace or for the continuation of filling the floor.

Q. As a matter of fact, when you floored up across your tunnel, if there was a post here you would let that go until you would get a piece to fit in like this?

A. Yes, sir.

Q. You say that one of the men would take the measurement, [68—41] one of the four men?

A. Yes, sir.

Q. And the other two men would saw this piece, these pieces? A. Yes, sir.

Q. And you would take the pieces and put them where they belonged and nail them down?

A. Yes, sir.

Q. Then that completed the work of you four men? A. Yes, sir.

Q. How long had this last bent been up?

A. Which one do you mean?

Q. I mean the last one over which you fell?

A. I couldn't say how long it had been up.

Q. Been up several days?

A. Yes, it had been up several days.

Q. Had it been up as many as four days?

A. Yes, more than that.

Q. How long had you four men been working up there on the top floor?

A. Well, we must be working there three weeks, I guess—maybe more or less.

(Testimony of James Heney.)

Q. That bent was put up then while you were working up there? A. I think it was.

Q. Did you see them raise it up there?

A. I didn't see them raise that bent up, no—I think I was out in the woods felling the wood at the time they raised this bent.

Q. But it was floored clear up to and touching that bent, was it not?

A. On the top of the first set the floor was in.

Q. The flooring was clear up to the edge of the bent where [69—42] you fell over?

A. Yes, sir.

Q. Now, then, about what distance were these boards on the floor apart?

A. What distance were they apart?

Q. Yes.

A. What do you mean? I don't understand what you mean.

Q. I mean the boards that went across your tunnel—how far were they apart, between the boards?

A. They were lagged up pretty tight, as tight as we could put them in.

Q. So they were put up touching each other?

A. If we could get them in that way; yes.

Q. What kind of flooring were you using?

A. Two or three inch lagging, I think; two or three inch plank.

Q. Foreign or native?

A. I couldn't say. I think it was foreign timber.

Q. You say you were working around these posts for several days, around toward the end of the tunnel?

(Testimony of James Heney.)

A. Well, we had been working back and forth there for two or three weeks,—we were doing the lagging on top and on the sides and this particular day, we just started there that morning.

Q. You had occasion to go up here so you could see whether there was a railing up there?

A. Yes, sir.

Q. When you got up here, could you see daylight?

A. Yes, sir.

Q. How far back could you see daylight?

A. You couldn't see very far back through the tunnel.

Q. About how far would you say? [70—43]

A. I should judge about maybe ten feet.

Q. So that if you were back here, back in the tunnel toward the Kennecott end—

A. Which do you mean—where do you mean you could see the light? When you looked down through the tunnel, down the track?

Q. Yes.

A. That is what I mean,—when you looked down through this hole, you could see the track down below, about ten feet back you could see.

Q. If you were standing back from the end where you fell over, about ten feet, you could see the daylight down through this opening where you fell?

A. Yes, sir.

Q. Could you see it further back than that?

A. No, you couldn't see it further back than that.

Q. Then you looked right out there easily, off this end?

(Testimony of James Heney.)

A. Yes, you could look down and see the track below.

Q. That is the end where you fell?

A. Yes, sir.

Q. As a matter of fact, that steep grade that you spoke of coming up from Chitina bridge at the end of the tunnel, the Copper River end, stop 600 feet before you get to that end of the tunnel, so that you are on water grade for 600 ft. before you get to the top?

A. I guess it was about that. I couldn't say.

Q. And the tunnel is on water grade?

Mr. RITCHIE.—We object unless you explain what water grade is.

Q. It is practically level there, is it not?

A. I don't know that it is level—I couldn't say it is level.

Q. You have been over the track repeatedly? [71—44] A. Yes, sir.

Q. You have walked through the tunnel repeatedly? A. Yes, sir.

Q. You have walked through the tunnel and down the incline over the Chitina bridge? A. Yes, sir.

Q. And you recall it is level for maybe 600 ft. beyond the other portion of the bridge?

A. I couldn't call it level because the water runs down that way all the time toward the bridge—there was a drain back there to drain the tunnel. I don't know whether it was level. I never put a level on it to find out.

Q. Do you know whether there is any grade there for 600 ft.?

(Testimony of James Heney.)

A. There must be a grade or the water wouldn't run out.

Q. But beyond that point, there is a decided grade?

A. Yes, sir.

Q. That is going toward the Chitina bridge?

A. The Copper River; yes, sir.

At 12 M. recess to 2 P. M.

Court reconvened at 2.

AFTERNOON SESSION.

Continuation of Cross-examination of JAMES HENEY.

(By Mr. BORYER.)

Q. I believe you stated that at first you had carbide lights in the tunnel for the purpose of getting light, so you could see; is that correct? A. Yes, sir.

Q. Those carbide lights were taken out of the tunnel for the purpose of being taken down to bridge 75A where the rotary had had an accident?

A. Yes, sir.

Q. What did you use then as lights? [72—45]

A. We had lanterns and gasoline torches.

Q. After they had taken away your carbide lights?

A. We had gasoline torches and lanterns.

Q. How long did you work with those torches?

A. Well, I couldn't exactly say—off and on we would be out of gasoline.

Q. I mean about how long in time did you burn these torch lights, would you say for a week?

A. I couldn't say exactly.

Q. Three or four days? A. Yes, I would say so.

Q. How would you place those lights?

(Testimony of James Heney.)

A. We would place them on one of the posts.

Q. How would you fasten them up?

A. Drive a nail in the post and hang them up on it.

Q. Did you ever hang any up? A. Yes, sir.

Q. Just tell me how you would hang them up.

A. Simply drive a nail in the post and there was a hole in them, and put the gasoline light in on the nail.

Q. How many did you have, do you know?

A. I think we had two of them.

Q. Did that give you sufficient light to see to work?

A. Yes, sir; it helped some.

Q. When the train would come through, when you had those lights, could you see how to work then?

A. No; when the steam and smoke would be in there very bad, we couldn't see very well.

Q. That is, when the train would go through and the engine go through, the steam and smoke would come up through the floor? [73—46]

A. Yes, sir.

Q. And you couldn't see how to work? A. No.

Q. What would you do?

A. We had lanterns there that we would hang around and sometimes we would do a little work on the sets we were lagging—we had lanterns only, but could do a little lagging.

Q. You wouldn't continue working with the smoke up there?

A. Sometimes the smoke wouldn't be bad and we would continue working, but more times the smoke

(Testimony of James Heney.)

would be real bad and we couldn't continue work very well.

Q. And you stopped? A. And we stopped.

Q. Because you couldn't see how to work?

A. Yes, sir.

Q. Because the smoke was too bad?

A. Yes, sir.

Q. You stopped because you couldn't see when the smoke was bad how to work? Now, then, would you stop work also? A. Yes, sir.

Q. And would the other men stop work?

A. Yes, sir.

Q. As a matter of fact, when the smoke was bad, while you were burning your torches, you couldn't see how to work, could you? A. No, sir.

Q. And the same thing was true when you had your carbide lights, wasn't it?

A. The carbide lights would throw a little better light than the torches.

Q. And if the smoke was bad you couldn't see how to work then? [74—47]

A. We couldn't work when the smoke would be real bad.

Q. Altho you had the carbide lights, you wouldn't work then, would you? A. No.

Q. After the carbide lights had been taken away and the torches taken away, how long did you continue working with the lanterns that you were using?

A. Four or five days—about that, I guess.

Q. During those four or five days, that is all the light you had to see with while you were working?

(Testimony of James Heney.)

A. Yes, sir.

Q. And when the train would come through during those four or five days, would you stop working?

A. We stopped working this morning when the train—sometimes the train would come through and wouldn't throw as much smoke as other times; more times it came through and would throw an awful bunch of smoke; when the place was clear enough so we could see how to work, we would keep working.

Q. If you could see how to work, you would keep working? A. Yes, sir.

Q. And if you couldn't see how to work, you stopped working? A. Yes, sir.

Q. I believe you stated that sometimes when the smoke was bad that you walked back to the ladder and got down in the base or bottom of the tunnel?

A. Yes, sir.

Q. Did you ever do that before? A. Yes, sir.

Q. Why did you do that?

A. We got orders to do it.

Q. What orders was that?

First I will ask you— [75—48]

Q. From whom? A. Mr. Forrester.

Q. What orders was that?

A. He might have some timbers to take in and he would tell us to go down and take in those timbers and let the smoke get out.

Q. And he would tell you, then, when the smoke was bad in there to come down and when you came down, to take back some timbers.

A. He said, when the train was going through, and

(Testimony of James Heney.)

the smoke was bad up there, "We have some timbers to take in and we will take those timbers in and let the smoke clear out, until it clears off."

Q. The trains had been passing through there during these few months you had been working in this place?

A. Yes, since the time the dirt was taken out and they got the track straightened out they started to run the trains through there.

Q. I had forgotten how long you had been working above, on that upper floor?

A. I guess three weeks or close to a month.

Q. Trains had been passing through there every day or every other day?

A. Something like that.

Q. Sometimes there would be several trains through there a day? A. Yes, sir.

Q. I understood you to say that you had no foreman that day. A. No, sir.

Q. You four men were looking after the work yourselves?

A. Yes, Mr. Forrester came around there in the morning and told us what to do and we followed his orders. [76—49]

Q. Mr. Forrester was an engineer?

A. Yes, sir.

Q. Now, why would you stop work up there when the smoke was bad?

A. Well, it was kind of suffocating up there—we had to stop work, we could hardly breathe with it.

Q. Would you stand still or sit down?

A. Sometimes we sat down, but more times we

(Testimony of James Heney.)

would stand still and look for a place where the smoke wasn't coming up so bad and stand on that place.

Q. Other times you would sit down?

A. Other times we would sit down.

Q. And other times you would go down below?

A. Yes, sir.

Q. Mr. Forrester told you not to work while the smoke was in there and it was bad, I understood you?

A. No, he never told me. I don't remember his telling that.

Q. I understood you to say a moment ago he told you when the smoke was bad to come down and get timbers?

A. Yes, but he didn't tell us to stop work; we were working then.

Q. He told you to come out of there?

A. He told us to come down and get some timbers and let the smoke get out of there.

Q. I believe you stated that the engine blew her whistle before she came in. A. Yes, sir.

Q. And they were ringing the bell as they came in?

A. Yes, sir.

Q. And that two of the gentlemen were sawing the braces that you were putting in? [77—50]

A. Yes, sir.

Q. And as this train came in, after the whistle blew, he told you, one of them told you, to put in these braces; is that correct? A. Yes, sir.

Q. Could you hear him, what he was saying, with the bell ringing and the whistle blowing?

(Testimony of James Heney.)

A. Yes, sir.

Q. You could hear that? A. Yes, sir.

Q. And after the bell rang and after the whistle blew this man told you to take this brace, these braces, and put them in where they belonged?

A. He had the brace already back there.

Q. Back where?

A. Back where they belonged, where I was going to put them in—he took them back himself when they were sawed.

Q. He had taken them back to that point?

A. Yes, sir.

Q. Had the train gotten by you before you started back to that point? A. Yes, sir.

Q. The engine had gotten by you? A. Yes, sir.

Q. And the smoke was up in front of you there?

A. Yes, sir.

Q. And then you started to walk towards the way the engine was going? A. Yes, sir.

Q. And the smoke coming up in front of you all the time? [78—51] A. Yes, sir.

Q. And you were going over there to put in those braces? A. Yes, sir.

Q. And the train was entering the tunnel from the Kennecott end, coming toward Chitina; that is correct, is it? A. Yes, sir.

Q. After the whistle had blown and the bell was ringing for the tunnel, someone told you to put in those braces and the point where you were going to put in those braces was down toward the opposite end of the tunnel, on the Chitina end of the tunnel—

(Testimony of James Heney.)

is that correct? A. Yes, sir.

Q. Where were you standing when he told you that?

A. I was standing on the floor of the tunnel.

Q. How close to the place where they were sawing these timbers?

A. I guess about—I should judge about ten feet, maybe 6 or 8 or ten feet; something around there, maybe less.

Q. Approximately that? A. Yes, sir.

Q. And after he told you this, and after the train had passed you and the smoke from the train had begun to come up through the floor, you started to walk towards the Chitina end of the tunnel?

A. Yes, sir.

Q. The same direction that the train was going?

A. Yes, sir.

Q. You could see the smoke as it was coming up?

A. Yes, sir; when it started to come up first I could see it.

Q. You continued walking then, expecting to get to the point, the place where you were to put in these braces? A. Yes, sir. [79—52]

A. How far was that from where you started from, about? A. About 20 or 25 feet.

Q. You had with you a lighted lantern?

A. Yes, sir.

Q. And did you have a hammer do you know, or not?

A. I couldn't recollect whether I had a hammer in my hand or not.

(Testimony of James Heney.)

Q. Now, then, you walked along and walked past the place where you were going to put in these braces, did you?

A. The braces were right alongside of the hole where I fell down, one was alongside of the hole.

Q. One was alongside of the hole?

A. Yes, there was nothing between the place where I was going to put this brace, but this post and the hole.

Q. You mean the hole at the end of the tunnel?

A. Yes, sir.

Q. And instead of stopping there, you stepped over it? A. Yes, sir.

Q. And fell down on to the next floor of the tunnel? A. Yes, sir.

Q. It was your intention to keep going in the same direction as the place you wanted to work?

A. It was my intention to go down to the place where I was working.

Q. And when you got close to this point where you wanted to put this brace in, did you stop and look around to see where you wanted to put it in, or not?

A. No, sir.

Q. Did you stop at any time after you started?

A. No, sir.

Q. You had your lantern with you at that time?

A. Yes, sir. [80—53]

Q. You had it lighted? A. Yes, sir.

Q. Could you see the light of your lantern?

A. Yes, sir.

(Testimony of James Heney.)

Q. How much of a light did you throw out around you?

A. I didn't throw very much light around.

Q. About how many feet would you say?

A. I couldn't exactly say, because you couldn't see the floor the way the smoke was coming up through, it was coming up that thick.

Q. It was coming up so thick that the light of your lantern wouldn't permit you to see the floor?

A. No, sir.

Q. Then you couldn't see the sides?

A. If you were close to the side you could see the side—if you were close to it with a lantern.

Q. Were you close to it?

A. Yes, I walked down along the side.

Q. Could you see the side as you walked along?

A. Yes, sir.

Q. And you would see it all the way down?

A. Yes, sir.

Q. Could you see it to your right side?

A. There was the timbers along on the right side of me—I went down between two sets of timbers.

Q. How many feet could you see in front of you?

A. You couldn't see nothing down below where you were walking.

Q. You couldn't see the floor down there?

A. No, sir.

Q. You could see the side?

A. Yes, you might see a little in front of you with a light, [81—54 & 55] maybe a couple of feet would be as much as you could see ahead.

(Testimony of James Heney.)

Q. What hand did you have the lantern in?

A. In the left hand.

Q. That would be on the side that was walled up?

A. Yes, sir.

Q. How were you carrying it?

A. Carrying it along like that (indicating).

Q. In front of you? A. Yes, sir.

Q. Then you could see a couple of feet in front of you? A. Yes, sir.

Q. And could see the side? A. Yes.

Q. Now, then, the floor was boarded up clear to the end of the side, was it not? A. Yes, sir.

Q. Flush across on the end?

A. Right flush across the end.

Q. Are you certain that you saw the side all along as you walked?

A. I didn't look at the side all the time.

Q. Which way were you looking?

A. I was looking ahead of me.

Q. What were you looking ahead of you for?

A. So I could see where I was walking.

Q. And you had your eye and your mind on looking ahead?

A. My eye and my mind to go back there and put in the lagging where I was working—that was what I had my mind on.

Q. You were looking for that point? [82—56]

A. That is what I had my mind on; yes, sir.

Q. You are certain you didn't have your eyes closed? A. I should say not.

Q. And you are certain you knew what you were

(Testimony of James Heney.)

doing? A. Yes, sir.

Q. You didn't have your hand up against the wall feeling your way along? A. No, sir.

Q. How close were you to the wall?

A. It was about four feet between these timbers and I was walking in the centre of that 4 ft.

Q. How close could you get to the wall—you could see the wall, could you?

A. There was about a foot each side of me, the timbers on one side, and the wall and timbers on the other side.

Q. You could feel it as you walked along?

A. Yes, as I put my hand out I could feel it.

Q. Now, after you fell through, I believe you said that someone took you from there on a cot or carried you up to your home? A. Yes, sir.

Q. You were living close by?

A. I was living pretty close.

Q. Up on the hill, just around there?

A. Yes, sir.

Q. What way did they carry you?

A. I don't know how they took me out of the tunnel.

Q. I mean after—on your way up?

A. They got under my arms.

Q. And you put one arm around the shoulder of each man? A. Yes. [83—57]

Q. And they braced you underneath?

A. Yes, sir.

Q. Did you sit on their hands or sit on a board or what?

(Testimony of James Heney.)

A. My arms were resting on their shoulder and they carried me that way.

Q. Did you walk on one foot or not?

A. No, I don't think I did.

Q. Did they keep you off the ground?

A. Yes, if I walked on one foot, the one that was dislocated, that was dragging, I guess; I must have had that off the ground.

Q. You don't recall whether you were walking with your other foot or not? A. No, sir.

Q. Did they do anything to your hip down there before they took you home? A. No, sir.

Q. After you went home they put you in bed, did they? A. Yes, sir.

Q. Doctor Thom was called? A. Yes, sir.

Q. Will you tell me what position you took in the bed?

A. I couldn't exactly remember what position I took on the bed; no.

Q. I mean as to your injured hip?

A. I think they let me lay on the broad of my back—I am not sure.

Q. Do you know which way your foot was pointed, was it pointed out or in?

A. I couldn't exactly say which way it was pointed.

Q. Which way did you carry it or keep it after you were in bed? [84—58]

A. After they set it you mean?

A. No, while you were in bed?

A. I couldn't tell you.

(Testimony of James Heney.)

Q. After the doctor came did you have it pointed out or in? A. I couldn't tell you.

Q. You were there in bed for some three weeks, I believe you stated? A. About six weeks.

Q. Now, during that time don't you remember which way your foot was pointed?

A. The six weeks? Yes, it was stretched out in the bed.

Q. Straight out? A. Straight out.

Q. But you don't recall whether it was stretched straight out before the doctor came or not?

A. No, sir.

Q. Were you etherized? A. Yes, sir.

Q. And your hip was put back in place?

A. Yes, sir.

Q. You say Doctor Council visited you?

A. Yes, sir.

Q. About when did he visit you?

A. I couldn't exactly say. I think it was two or three days after he came up there on the train.

Q. Has any other doctors ever visited you?

A. No, sir.

Q. Just Dr. Thom and Dr. Council? A. Yes.

Q. And have you consulted any other physicians in regard to it? A. No, sir. [85—59]

Q. How often did Doctor Thom see you?

A. Well, any time I would need him, that I was in very bad pain, they would call him and he would come down,—I couldn't say how often he was there. One day in particular my leg was just like it was crumbling up, and I couldn't stand the pain of it, and they

(Testimony of James Heney.)

sent up after him, and he got on top of the bed and sat down on my knee and straightened it out, and then got some snow and made a casing and put my knee in the snow and kept it there for probably half an hour or probably an hour until the snow all left it.

Q. That was where, on your knee?

A. Yes, right on my knee.

Q. Doctor Thom left there shortly after you were injured, did he not? A. Yes, sir.

Q. About how long after, if you recall?

A. I couldn't tell you.

Q. About a month or six weeks.

A. I don't know. I wouldn't say for sure how long it was.

Q. Were you out of bed when he left there?

A. I don't know.

Q. While you were confined to your bed I believe you stated that you had some trouble with your bowels? A. Yes, sir.

Q. I will ask you what kind of food were you eating during that time?

A. Some toast, a little tea and soft boiled eggs.

Q. On a regular diet, were you not?

A. I wouldn't eat very strong, not the same as if I was working.

Q. There wasn't anything wrong with your stomach, was there? [86—60]

A. Not a bit in the world.

Q. And there was nothing wrong with your digestive organs—you could eat anything you wanted to eat?

(Testimony of James Heney.)

A. I don't know—I was pretty weak for a long time.

Q. After a day or two you could have eaten other stuff, could you not?

A. Yes, sir, when I got all right, when I got strong I could eat anything.

Q. That is after a day or two?

A. No, not after a day or two.

Q. About a week?

A. No, it was more than that before I started in eating—it must be a month before I started in eating regular meals.

Q. But during that time while you were in bed, you ate eggs and toast and tea? A. Yes, sir.

Q. Any bacon or ham? A. No, sir.

Q. Why didn't you eat that?

A. I didn't feel like eating it.

Q. Because you didn't feel like it? A. No.

Q. Don't you know that eggs are constipating?

A. I don't know. I eat quite a lot of them; they never bother me.

Q. During all the time that you were working for the company, while you were working on the section, etc., you were only drawing down \$3.50 a day—ten hours work at 35 cents an hour?

A. Yes, when I worked on the section.

Q. At this particular time you were doing a hazardous work and working as a carpenter and being paid \$5.00 a day? [87—61] A. Yes, sir.

Q. Now, you built your little home up at McCarthy? A. Yes, sir.

(Testimony of James Heney.)

Q. Cut the logs for it? A. No, sir.

Q. You cut some logs, did you not?

A. I got men hired to do that work for me.

Q. Didn't you cut some of them? A. No, sir.

Q. Didn't you bring the logs down to the building?

A. I helped take them down yes.

Q. What do you mean by helped?

A. I had a man hired with a horse, and I went out there and helped him.

Q. How many men did you have hired cutting the logs? A. Two.

Q. Two men hired cutting the logs?

A. Yes, sir.

Q. And then did you bring the logs down?

A. No, not until later on.

Q. And you were helping taking them down?

A. Yes, I was up there along with the man with the horse.

Q. What sized logs were they?

A. A ten-inch face and from 4 to 6-inch tops.

Q. How long were they? A. Some 26 ft.

Q. And you helped to build your home?

A. Yes; I was there when they were building it but I had two men on the building—I was around the building all the time.

Q. You were working with them all the time?

A. I was working with them a little. [88—62]

Q. You were working with them all the time?

A. Yes, I was there at the building all the time.

Q. And was helping to haul the logs up to the building? A. Yes, sir.

(Testimony of James Heney.)

Q. The building is how high?

A. About 6 or 7 ft. high.

Q. How long? A. 24 ft. long.

Q. You cut all the wood for your restaurant?

A. Yes, sir.

Q. Did you go out in the woods and cut that and then haul it in?

A. I did go out there and get a little wood and haul it in with the dogs.

Q. You do general work around your restaurant, do you not?

A. Yes, sir; hauling the wood and saw the wood.

Q. Didn't you help do anything else around there?

A. When we were rushed I would help my wife wash the dishes.

Q. How long have you had your restaurant?

A. Went up there a week before Christmas.

Q. Did you ever make a mush from 146 to Chitina?

A. Yes, sir.

Q. In the winter? A. Yes, sir.

Q. Did you ever walk over Spirit Mountain?

A. I don't know where Spirit Mt. is—I don't know where it is. I did not.

Q. That is close to Chitina?

A. No, I never walked over it.

Mr. BORYER.—That is all. [89—63]

(By Mr. RITCHIE.)

Q. Just describe that platform floor a little bit, that is, as to the way the planks were laid on it, and also tell how many holes or hatches there were in it as near as you can remember.

(Testimony of James Heney.)

A. The planks were laid along the length of the floor. They were laid up and down pretty tight, and right between the posts there were places left open and along the centre of the tunnel there were some hatch holes there that were open where they used to hoist up this lagging.

Q. In laying the plank on them do they carefully frame the joists all the time?

A. Some places there were planks that didn't quite catch on, they would be too long and extend over between the sets.

Q. These lights, the first lights you spoke of, were acetylene lights, carbide lights? A. Yes, sir.

Q. And as long as they were burning it was easy to see all the holes and dangerous places?

A. Yes, sir.

Q. You told Mr. Boryer this morning that when you worked on the section you got \$3.50 a day and then you said something about \$1.00 for board—didn't you board at home? A. Yes, sir.

Q. Did you have to pay something for board?

A. No—Mr. Boryer meant if I stayed at the company camp—I would have to pay one dollar a day there.

Q. You would have paid one dollar a day for board if you stayed there?

A. Yes, sir—I think that is what Mr. Boryer meant.

Q. Mr. Boryer asked you some questions about coming down previously [90—64] when Mr. Forrester told you to, when the trains would come

(Testimony of James Heney.)

through and leave smoke. Do you mean that there was a standing order there or you came down when Mr. Forrester was there himself and told you?

A. When Mr. Forrester was there and he had anything to do, he would tell us to go down and we would do that when the smoke was in there.

Q. How big was this wood that you have been cutting for your restaurant?

A. It is small wood.

Q. You don't claim to be a helpless invalid?

A. No, sir.

Q. You only claim to be crippled to a certain extent? A. Yes, sir.

Q. Are you doing all the work you can?

A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. And are willing to do it?

A. I am willing to do all I can.

Q. How much of a family have you?

A. I have one little girl.

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff excepts.

(By Mr. BORYER.)

Q. I believe you stated that from what the doctors told you you believed you could never do any more work. A. I didn't make that statement.

Q. As a miner? A. Yes, sir. [91—65]

Q. What doctor ever told you that?

A. I didn't say the doctor ever told me that.

Q. Then the doctors didn't tell you that?

(Testimony of James Heney.)

A. No, sir.

Q. Did the doctors tell you anything about your future condition? A. No, sir.

Q. Your counsel has asked you in regard to hatches or openings on the floor of this tunnel?

A. Yes, sir.

Q. It was your duty to close those hatches up after you had used them, was it not?

A. Well, I don't know whether it was my duty or not. I wouldn't be working at that all the time.

Q. If you were working there, you would do it—you didn't fall down either one of those hatches?

A. No, when I got through with them, if there was any lagging around there, I covered them holes up.

Q. He asked about the floor being joined at places—the floor was all right and safe to work on?

A. It was very risky there while they were putting in the timbers at places—it was all holes, in fact.

Q. You didn't fall down by reason of any of them?

A. No, sir, I did not.

Q. As a matter of fact, what you did was to walk off of the end of the tunnel, was it not?

A. Yes, sir.

(By Juror PEDERSEN.)

Q. Was it your custom, or rather did you have sufficient warning when the trains were entering the tunnel to go down as [92—66] a rule, and did you go down?

A. Yes. Mr. Forrester told us sometimes, when he would have some work for us to do on the outside, timbers to haul into the tunnel, he would tell us to go

(Testimony of James Heney.)

down and take in those timbers and let the smoke clear out, but when there was no work to be done, we didn't get any orders to go down.

Q. Even when Mr. Forrester was not there, was it your custom generally to go down if you heard the train in time to get down to avoid the smoke?

A. As a rule, we wouldn't be able to get down at the time we heard this train.

(By Mr. RITCHIE.)

Q. Mr. Pedersen means to ask you whether on some previous occasions you had heard the train in time to get down.

A. Yes, we did—we were too far from the ladder.

Q. On this occasion you didn't hear it in time?

A. No, sir.

(By Mr. BORYER.)

Q. How far were you from the ladder?

A. I should judge maybe 75 ft. or 50 ft.—50 to 75 ft.

Q. How far was the ladder from the end of the tunnel where the train entered?

A. It was about in the centre of the cave-in or a little more to the Copper River side.

Q. The tunnel is about 500 ft.? A. Yes, sir.

Q. I mean the tunnel proper. Now, then, you were about 50 ft. away from the ladder?

A. Yes, sir.

Q. And the ladder was about in the centre of the tunnel? [93—67] A. Yes, sir.

Q. Then the hole would be about 250 ft. away from the point where the engine entered the tunnel?

(Testimony of James Heney.)

A. I should judge so; maybe more than that—it might be 300 feet, 250 or 300 ft.

Witness excused. [94—68]

[Testimony of W. H. Slimpet, for Plaintiff.]

W. H. SLIMPET, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Where do you reside at present?

A. Chitina.

Q. What are you doing just now?

A. Mining and prospecting.

Q. How long have you been in Alaska?

A. Ever since the 17th of Jany., '98.

Q. In different parts of Alaska? A. Yes, sir.

Q. How long have you been in this part of Alaska?

A. Since May, 1906.

Q. You worked for some time on the Copper River & Northwestern Railroad?

A. Off and on ever since.

Q. What has been your general business?

A. Construction foreman on the Copper River & Northwestern.

Q. You have done some mining?

A. Some mining.

Q. What were you doing in December, 1911, and January, 1912?

A. Working in the Chitina tunnel.

Q. What were you doing in the tunnel?

A. Well, after the dirt was removed I went to work

(Testimony of W. H. Slimpet.)

with the carpenters—first after the dirt was removed cut some timber to make lagging.

Q. Are you acquainted with the plaintiff?

A. Yes, sir.

Q. Were you working with him during the months I have mentioned? A. Yes, sir. [95—69]

A. Yes, sir.

Q. All the time?

A. Not from the time we started—he was working night shift and I was working day shift.

Q. During the months of December and January you were working most of the time in the same crew with him? A. Yes, sir.

Q. What were you doing in the tunnel in the latter part of December, 1911?

A. Some time probably about the middle of December we got through cutting the lagging and began to lag it up on the tunnel.

Q. When did you begin working on the platform, the top of the tunnel proper?

A. Toward the latter part of December.

Q. And from that time on you were working mostly on the platform?

A. Some days we would be on the platform and sometimes underneath, as the carpenters raised the timbers ahead of us—we were working on the lagging and flooring, carpenter work.

Q. How was the tunnel lighted in December, if at all?

A. We had two carbide acetylene lights and gasoline torches and common lanterns.

(Testimony of W. H. Slimpet.)

Q. When the acetylene lights were burning did it make a good light? A. Yes, sir, a good light.

Q. The ones used there, were they powerful lights?

A. One was very large—it would throw a light easily 300 ft. with a reflector on it.

Q. Were those lights equal to the ordinary street light?

A. The largest would make a light equivalent to a small arc-light [96—70] in the city.

Q. How were the lights when these acetylene lights were burning?

A. They would make a bright light, the same as any electric light.

Q. You could see without any difficulty a certain distance? A. Yes, sir.

Q. Did they take those lights out?

A. Yes, after the wreck of the rotary on 76, Mr. Forrester came up and I helped him take the larger one of the two down and take it over to the depot and load it on the train.

Q. About what time was that?

A. It was early in January. I wouldn't be positive of the date.

Q. Then how was the tunnel lighted for your work after that?

A. We had two gasoline torches. We used those as long as there was any gasoline, after that hand lanterns.

Q. How long did the torches last?

A. I couldn't say—one or two or four or five days.

Q. Do you remember the 19th of January—did

(Testimony of W. H. Slimpet.)

anything happen that day?

A. I couldn't recall any date.

Q. Do you remember when Heney was hurt?

A. Yes, sir.

Q. How long before the day that Heney was hurt had you been using hand lanterns?

A. Well, we had some hand lanterns all the time, but we had been out of gasoline for two or three days and possibly longer.

Q. And had been using those small hand lanterns exclusively?

A. Yes, sir, and we had one larger lantern, a kind of stationary lamp, with a reflector on it. I wouldn't be positive whether we had it then or not. We had them in [97—71] the tunnel—we had lanterns of various kinds.

Q. How many lanterns did you have the day Heney was hurt? A. Three.

Q. How many men were working that day?

A. Four—Henry Adler and I were doing the sawing. We had one light and Shorty was doing the measuring and Heney was putting in those pieces between the timbers. They were second-hand lumber, lumber that had been used, most of them 2x12.

Q. Do you know anything about a hole stretching clear across the tunnel toward the Chitina end?

A. Yes, sir.

Q. Describe that hole.

A. When they began to raise the timbers in the tunnel set, they began to raise it in the cave-in, over that end, and there was one set of timbers out there

(Testimony of W. H. Slimpet.)

and they raised from the Chitina end, going towards the Kennecott end, or Copper River end, and this place was left open.

Q. As long as you had the acetylene lights and torches could you see that hole?

A. If the lights were turned that way you could see it plain.

Q. Easily?

A. Yes, sir; if the lights were turned that way; we used reflectors on this acetylene light part of the time—we used the reflector to show the light one way; if it was back of the reflector you wouldn't see it so plainly, that is—unless it was daylight—you could see a little daylight from the hole.

Q. Were there any other holes on this platform?

A. Yes, this upper set of timbers was put up with five posts and with four sets, and taking the space in next to the wall [98—72] those holes were for hoisting lagging and whatever timber was thought necessary.

Q. How many of these hatches were there?

A. I couldn't be positive; they were putting in lagging as they needed them and the same on the other set.

Q. After you got down to hand lanterns were any of these hatches open?

A. We used one the day Heney got hurt.

Q. Where was that located?

A. The one that we used that day was about 35 ft. from the end of where this hole was or platform and it was on the north side of the tunnel, that is,

(Testimony of W. H. Slimpet.)

not in the outside set of timbers but the next set, about 35 ft. to the east from the west end of this opening.

Q. How did you get up on that platform?

A. Got up on a ladder between two sets of timbers.

Q. In what part of the tunnel was that ladder located?

A. At this particular time the ladder was located within about 40 or 50 ft. of the east end of the cave-in, on the south side of the tunnel.

Q. How far would that be from the big hole clear across? A. It would be at least 125 ft.

Q. And towards the Copper River side?

A. The ladder was towards the Copper River side; yes.

Q. After you got down to hand lanterns did you ever ask for any other lights—speak to anybody in authority about it?

A. Well, we spoke several times to Mr. Forrester, I did, saying we could use more lights.

Q. Were any other lights given you?

A. Not at that time. Later, after this, Mr. Foster and I [99—73] went down and took a head-light off of one of those dinky engines that set down by the depot. We did take it off afterwards and use it in the tunnel.

Q. At the time that you were using only hand lanterns, you spoke to Mr. Forrester about being short of lights. Now, what statement, if any, did he make?

A. I don't remember.

Q. On the afternoon that Heney fell through this

(Testimony of W. H. Slimpet.)

hole—about what time in the afternoon was it?

A. I should judge about the middle of the afternoon.

Q. What, if anything, happened just before he fell through?

A. The train came through from the Kennecott end—

Q. Describe the approach of that train and when you first noticed it.

A. We were working, sawing, and the train whistled just at the east portal of the tunnel and came immediately through and went on to Chitina and I was standing right where the sawing was—I don't know, I couldn't say, but I think Heney was on the opposite side, about 5 or 6 ft. from where I was but I neither saw Jimmy or Shorty—he was measuring at the time before the train came through and the next I heard—I heard somebody holler, "For Christ's sake, stand still! There's one man down already!"

Q. When the train went through, what effect, if any, did it have upon the tunnel and the air in the tunnel?

A. It always had more or less effect, of course. Various times the smoke wasn't bad as it was others—several times it seemed as if the fireman had just fired up and the smoke would be very black and suffocating, and it was on this particular occasion.
[100—74]

Q. How dense was that smoke and gas? Speaking relatively as to the amount of smoke thrown out

(Testimony of W. H. Slimpet.)

from an engine ordinarily, and the results of it?

A. You couldn't see a man at 15 feet any time.

Q. Was the gas noticeable?

A. There is always more or less gas in coal smoke.

Q. On previous occasions when the train would come through the tunnel, was there any rule or custom or order as to what was to be done?

A. Those things are usually met at the time. One time when we had timbers to get in, Mr. Forrester gave us orders to go down and also told the foreman to bring heavy timbers in; this time all the timbers except a few sets in the upper deck were in and in place, so we had nothing to do at this time except to bring in the flooring and that was in.

Q. Had you seen Mr. Forrester that day?

A. He was in the tunnel that forenoon.

Q. What did he do there that morning?

A. He is the man that gave us the orders to put in these fillers between the posts.

Q. Did he do anything further than to give you orders for the day's work?

A. Nothing that I recall.

Q. Did he come back after that during the day?

A. No, not until the accident happened; he came back then.

Q. How much light did you get from one of these small hand lanterns?

A. In a smoke like that it is a kind of red glow—you could hardly call it a light.

Q. When there was no smoke in there could you do ordinary work such as you were doing? [101—

(Testimony of W. H. Slimpet.)

A. Yes, we always moved our light right to where we were working—we shifted our lights so they would show where we were doing our work.

Q. You placed your lantern so as to throw light on your work? A. Yes, sir.

Q. And after the smoke came from the engine into the tunnel the lantern showed as a red glow?

A. Yes, sir, that's all.

Q. Would it throw any light at all?

A. No, you couldn't say it would.

Q. Was there at that time or had there been previously any guard-rail on that hole, that went clear across the tunnel?

A. There wasn't at that time and had not been to my knowledge.

Q. Was there any light there? A. No, sir.

Q. Were you ever given any light to place there?

A. No, sir.

Q. And you only had three lanterns that day?

A. We only had three lanterns that day.

Q. And required all three of them for your work?

A. Henry and I required one and the boys each one as far as I know—I don't know where the other two were. We just worked at this one particular hatchway sawing the lumber.

Q. If there had been a lantern placed low there, a lantern or a torch, in a sort of narrow hole or shaft right on the side of that big hole, could a man have seen it through that smoke, if he was approaching the hole?

(Testimony of W. H. Slimpet.)

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception. [102—76]

A. If the light was one side of the tunnel and you were on the other, you couldn't have seen it—the smoke was too dense.

Q. If the light had been directly in front of you as you approached it?

A. Yes, you could have seen if there was a light there.

Q. Did you see Heney at the time the train came through?

A. He was working back of us—I don't remember whether I saw him or not. He was hammering; he was working between where we were working and this hole. Occasionally he would come over and get the planks we sawed off.

Q. After you heard the man calling out that somebody had fallen through the hole, what did you do?

A. We took the lantern and Shorty and I, Henry and I went down, walked up to the ladder and went downstairs.

Q. What did you find there?

A. When we got there the saw-filer and blacksmith they had Heney on his feet and he had an arm around each one of their shoulders and they had their arms around his waist and were trying to take him home, and Henry and I went over to the bunk-house and got one of those canvas cots used by the company and tried to use it as a stretcher, but he

(Testimony of W. H. Slimpet.)

couldn't stand it to lay down on it. We first used a push car—I don't know which we used first. He seemed to be in so much pain we couldn't do anything with him, and as I got to the mouth of the cut, I met George Hayes, and went to get the doctor and his wife and I met Forrester and told him Jimmy was hurt, and Doctor Thom had a hospital probably 50 or 75 ft. from where Heney lived, and as I went by I told him and asked him, "Shall we bring him here or take him home" and he said, "Take him home." [103—77]

Q. Who said that? A. Doctor Thom.

Q. Where was Heney's house?

A. Over on the Chitina heights, off from the town-site.

Q. That is on the hill?

A. It is south of the tunnel and east of the lake.

Q. On the hill through which the tunnel runs?

A. Yes, sir.

Q. What were the names of the men who picked up Heney?

A. Chris Likits was one of them and the other was John—a big fellow, a Scandinavian. I don't know his other name.

Q. Will you describe that hill and the way the tunnel runs through it, the hill at the east end of the town of Chitina through which the tunnel is bored to reach the Copper River side—going from the Chitina end to the Copper River side? In going from Chitina over to Copper River there is an open cut there and at present there is a tunnel or set of timbers outside of the tunnel proper—there is no dirt

(Testimony of W. H. Slimpet.)

on top of them—a distance of about 100 ft., and these are lagged up just the same as the tunnel is, and then you come to where the dirt is over it and as you went in at this time there were 8 sets of old timbers that had not been taken out or had been caved in.

Q. Describe the track and grade from the end of the tunnel down to Copper River.

A. It is downgrade from the end of the cut on the Chitina side to the Copper River; there is quite a heavy curve in the cut; when you get out it is still curved and the curve is very steep, I judge two per cent or more, going down to the Copper River.

Q. Do you know what the grade is coming into the tunnel and [104—78] through the tunnel?

A. I understood that Mr. Howell and probably Mr. Forrester told me it was one-half of one per cent coming in from the Copper River end.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. There is something like 600 ft. of a level before you get into the tunnel?

A. Something like that. I wouldn't be positive about the distance—not of a level, no, comparatively level.

Q. So then you start down an incline?

A. The track runs low going towards the Copper River from the depot.

Q. Now, then, I believe you said with the smoke in there it was practically impossible to see even a lantern?

(Testimony of W. H. Slimpet.)

A. You could see a lantern only at a short distance.

Q. Then the lantern would be giving out some light? A. Certainly.

Q. Even in this smoke? A. Yes, sir.

Q. During the time that you were working in there with these men, what work were you doing?

A. This particular day?

Q. Yes.

A. Henry Adler and I were doing the sawing, sawing up these lengths as Shorty came in and gave us the measurements.

Q. He would do your measuring then?

A. He measured them, came over and marked it off on the plank and we simply done the cutting.

Q. What kind of light was he using to do the measuring? [105—79]

A. I think he had a lantern with him.

Q. The same as you had? A. Yes, sir.

Q. And you were doing the cutting with this lantern? A. Yes, sir.

Q. And he would mark the boards and you would follow the mark by this lantern?

A. Yes, we had a lantern right where we were working all the time.

Q. So you had sufficient light to do the work that was necessary for you to do?

A. Before the smoke came in there, that is we could do the work we were doing that day, that kind of work.

Q. This lantern gave you sufficient light to do all the work that you did the day before, did it not—

(Testimony of W. H. Slimpet.)

these lanterns gave you sufficient *work* to do the work the day before?

A. Well, they did—it was inconvenient, that is all. If we moved at all we had to pick up the light and move with it.

Q. You had plenty of light as you moved around through this tunnel?

A. Yes, if you carried the lantern you could see all right.

Q. If you had a lantern in your hand, with that smoke in there, how far could you see ahead of yourself?

A. A very short distance.

Q. About what distance?

A. I don't think I could give an estimate correctly.

Q. Can you approximate it?

A. Looking down at the floor—I know I carried the lantern when we went out after Heney was hurt and to see the floor I had to stoop over and hold the light right over the floor, to [106—80] see the floor of the tunnel.

Q. Then would you say that you could see the light two feet?

A. In what direction? Up?

Q. No, in front of you?

A. Yes, you could see two feet in front of you, holding the light in front of you—I think you could easily see it.

Q. Then if you could see it two feet, it would be throwing a light two feet ahead?

A. Yes, sir.

Q. Would you say you could see it three feet?

A. No, I wouldn't say any particular distance at all.

(Testimony of W. H. Slimpet.)

Q. Would you say that you could see it five feet?

A. If you were packing the light with you, standing here you possibly could distinguish the timber, from one timber to another in the tunnel; this particular time, those timbers were 4 ft. centres one way and the other 5½, I think.

Q. How far could you see the light ahead of you with the smoke as it was at that time?

A. You could distinguish a red glow at between ten and fifteen feet, I should judge; it wouldn't be what you would call a light—it would be more like a ball of fire.

Q. Do you know how thick the smoke was at the head of the tunnel that day where Heney fell?

A. No way of measuring it, the thickness or volume of it, that I know of.

Q. Do you know whether you could see down or not? A. Looking down?

Q. Yes.

Q. You couldn't see looking down from where I was.

Q. Do you know if you could have seen if you had been down there? [107—81]

A. Down on the track you mean?

A. No, if you were at the end of the tunnel where Heney fell off?

A. I don't know; I was not there.

Q. You don't know how thick it was there, do you?

A. No, it was about 35 or 40 ft. from where I was.

Q. Then you don't know how thick it was where

(Testimony of W. H. Slimpet.)

Heney fell off? A. No, sir.

Q. And don't know, if there had been a lantern there, if Heney could have seen it or not?

A. Not at that particular point. I am speaking of the place where I was at.

Q. You don't know how thick the smoke was down there where Heney fell off, at that end?

A. No.

Q. You don't know, if there had been a lantern there, if Heney could have seen it or not?

A. I couldn't judge about Heney's eyesight. Mine might be better than his, or poorer.

Q. If you don't know how thick the smoke was there—I am trying to find out whether you would know if you could see a lantern there.

A. That I couldn't possibly say—how thick the volume of smoke was in any part of the tunnel.

Q. You don't know whether you could see a lantern there or not?

A. I suppose the smoke was about the same all along.

Q. That is based on supposition?

A. Yes, that is judging from what it was where I was.

Q. How far could you see where you were standing?

A. I thought you could probably distinguish the glow of a lantern ten or fifteen feet. [108—82]

Q. How far could you see a man from where you were standing?

A. You couldn't see a man at 15 ft.—you couldn't

(Testimony of W. H. Slimpet.)

make out his outline at 15 ft.

Q. How far could you see him?

A. I didn't have a man in position to see, I couldn't say—I couldn't see the second set of timbers and that was 8 ft. off.

Q. Could you see the first set?

A. Yes, sir. I could almost touch them; that was 3½ ft. off.

Q. Where was Henry?

A. Standing kinder between them at one time. I don't know where he was at the time of the accident. We both had hold of a crosscut saw when the train came in.

Q. Could you see Henry?

A. At the time the accident happened?

Q. Yes—when the train went through, with the smoke in there?

A. What particular time?

Q. At the time that Mr. Heney fell down?

A. I couldn't see him at the time that fellow hol-
lered.

Q. You couldn't see who? A. Henry.

Q. How far could you see then?

A. I couldn't distinguish a man at 15 ft. I don't know how far you could see because there was no particular object to look at.

Q. Could you see anything else?

A. I could see the nearest post in this upper set of timbers.

Q. You say you are a construction foreman?

A. I worked so for the Katalla Company and M.

(Testimony of W. H. Slimpet.)

J. Heney for four seasons, a little better than that.

Q. Are you working for the Katalla Company now? [109—83] A. No.

Q. Are you working for anybody now?

A. Myself, since last fall. I worked for the Katalla Company or the Copper River & Northwestern last fall during the tie-up.

Q. If Mr. Heney said he could see at that end three feet or two feet with his lantern, do you mean to say he is mistaken? A. No, sir.

Q. You don't mean to say he is mistaken?

A. No, sir.

Q. And if Mr. Heney said he could see the sides, you don't mean to say he was mistaken?

A. I don't know where Heney was.

Q. You don't know what he saw?

A. No, I couldn't judge—there was probably thirty feet between us.

Q. You spoke about the hole at the end of the tunnel—that was the end of your bents across there, was it not? A. Yes, sir.

Q. In other words, that compared with the outside edge of a roof, did it not?

A. Of a flat roof; yes.

Q. Now, then, if you were working on a reef, a flat roof, would you put a railing around the roof?

A. I wasn't in charge of this work.

Q. I say, would you?

A. In what capacity would you expect me to be laboring?

A. I would expect you to be laboring up there as

(Testimony of W. H. Slimpet.)

a tinsmith or a man who was putting work on a roof, putting on different kind of roofing, say.
[110—84]

A. Finishing the work—they couldn't use a railing at that kind of work.

Q. Did you ever see them put a railing around a roof on a building—when they were putting a roof on a building? A. No, sir.

Q. You wouldn't do it?

A. No, I wouldn't put one on a building.

Q. Did you work on the other end of the tunnel?

A. The other end of the cave-in? Yes, sir.

Q. Were you one of the foremen?

A. Taking out the dirt I was foreman, but not after we got into timber work, until after this accident—I raised timber for a day or two, or a day and a half after this, when Mr. Lee was laying off.

Q. Did you know there wasn't a railing on there the day before this accident?

A. I know I never saw a railing on there.

Q. Why didn't you put one on?

A. Had no orders to.

Q. Did you think it was dangerous?

A. I consider any open hole in a dark room dangerous.

Q. Did you call anybody's attention to it?

A. No, sir—that is, not anybody in charge—might often have talked about these hatchholes and insufficient light and poor covering.

Q. Don't you cover these hatch-holes after you use them?

(Testimony of W. H. Slimpet.)

A. Sometimes we don't have timber to cover them completely; they were 5½ ft. wide, but sometimes we had three 12-inch boards over them.

Q. Didn't you have timber around the outside of the tunnel?

A. There is timber out there, undoubtedly.
[111—85]

Q. Did you bring any timber in to this hatch-hole? A. Me? No.

Q. You could have gotten timber to cover this hatch-hole, could you not?

A. I wasn't running the works.

Q. What were you doing?

A. At that time I was working part of the time as carpenter; sometimes I would be out framing with the carpenters and sometimes putting in lagging, and this particular day was fixing the floor.

Q. And you don't think it is your duty to protect yourself and your fellow-men when you are working?

A. How is that?

Q. Do you think it is your duty to protect yourself and to protect your fellow-men when you are working?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

By the COURT.—He may answer.

A. If I had charge of the work I undoubtedly, if I thought the place was dangerous, would try to fix it. When I went to work on this dirt work Mr. Forrester told me to be very careful of anybody working there—that is when I was foreman—and

(Testimony of W. H. Slimpet.)

try not to have any more accidents in the tunnel.

Q. Yet you saw this opening and wouldn't fix it?

A. I didn't have anything to fix it with.

Q. There was timber around there?

A. Any man working up above didn't have a right to go out and get a stock of timber every time he wanted it.

Q. Who told you not to do it?

A. No one—no one told us to do it.

Q. You are a construction foreman?

A. Of dirt work, yes, sir, not of timber work.

[112—86]

Q. When this train went through there and this smoke got to the point where you were standing, what did you do?

A. I stood about still, as near as I can remember.

Q. Why did you stand still?

A. I figured it was too dark to go down if I wanted to and that was the safest thing to do.

Q. That was the safe thing to do—stand still?

A. So I considered it.

Q. And you stood still? A. Yes, sir.

Q. What did Heney do?

A. I don't know—I don't know whether he was there just when the smoke got to us or not. I didn't see him for quite a little while.

Q. What did Heney do?

A. I couldn't tell you that.

Q. Are you the man that told him to take that timber or told him to go down and fix that place?

A. I am not.

(Testimony of W. H. Slimpet.)

Q. But you stopped your work when the train went through?

A. I couldn't see a line to do any sawing with.

Q. When was it you heard this remark, "For Christ's sake, stand still!"

A. It was shortly after the train went through.

Q. After the smoke had gotten past you?

A. Yes, I think the train was out of the tunnel, possibly a minute or some such a matter. I didn't pay any particular attention to it because I was rather excited when I heard the remark, a man naturally would be.

Q. You were excited?

A. After the remark. [113—87]

Q. Why were you excited?

A. I wondered who had fallen. There was no one in sight. I couldn't see any one of the other three just at that time.

Q. Now, then, I believe you stated that you had been given instructions that when trains came through there and it was smoky for you to go down, did you not?

A. When we had something to do downstairs, yes, sir.

Q. When you had something to do downstairs—do you mean that? A. Sure I mean it.

Q. As a matter of fact, were you not told when the train came through there to go down?

A. I was not.

Q. And while you were down, to perform some work down there?

(Testimony of W. H. Slimpet.)

A. No, sir, you have got it wrong.

Q. Haven't you got it wrong?

A. No, sir, no chance.

Q. The only time you went down then was when the train went through, was it not?

A. No, sir, we went down lots of times and brought in timber when there was no train around—when the timber-men or the outside men were short, we would go down and bring in timbers.

Q. You could go down?

A. In what respect?

Q. When the train started into the tunnel, you could go down?

A. A person is always at liberty on any work to go any place for a certain length of time, provided you are back—you don't have to go and ask for an excuse to go any place, if you are gone a reasonable length of time.

Q. Well, you could have gone down when the trains came through. [114—88]

A. Yes, if you had something to do—if we didn't, we would have to come back up.

Q. If you were working, you could go down, couldn't you? A. Yes, sir.

Q. Could go down into the lower part of the tunnel? A. Yes, sir.

Q. When the trains went through there before, and the smoke was dense, would you stop working?

A. For a short time, yes, sir.

Q. And until it had cleared up?

A. Until it was partially cleared up.

(Testimony of W. H. Slimpet.)

Q. About how often would the trains run through there?

A. Well, she used to run through going up to Chitina, occasionally she double tripped it, the hill—that would make three trips there through the tunnel, and coming back; if she was hauling ore she would make possibly three trips,—I think probably she might have had to make two round trips, that would make five single trips through the tunnel—on one occasion I think she probably did.

Q. Were they going through there every day?

A. No, not every day. I don't think the trains were making but three round trips to Kennecott at that time,—I wouldn't be positive of that.

Q. When you had your large lamps in there, were the trains running through then?

A. Yes, sir; part of the time.

Q. And would they make much smoke then?

A. Sometimes they made lots of smoke.

Q. How far could you see?

A. Well, it depends; if you were looking at the lamps you [115—89] could see quite a ways, and if you were looking away from the lamps, you couldn't see so far.

Q. Did you ever go down, then, and bring up timbers?

A. We followed the practice of going down and bringing up timbers until the greater part of the large timbers were up—followed it to a certain extent; for some time before this the large timbers, the square timbers, were all up except a few, five sets,

(Testimony of W. H. Slimpet.)

I believe, that were raised the next day after the accident, and the caps of those were up.

Q. When you had the large lights there and the trains would come through and the smoke was dense, would you go down stairs, down in the tunnel?

A. If a person happened to be close to the ladder they sometimes went down, sometimes part way down the ladder; sometimes there would be three or four on the ladder—would go down part way, stand there a few minutes and then go back—didn't always go clear down to the track.

Q. How far were you working from the point or place where you came up the ladder?

A. Well, a little bit over 100 feet, I should judge—possibly as much as 125 ft.

Q. Mr. Heney says 50 or 75 ft. Who is right?

A. If I remember correctly, the cave-in is 180 ft. long, and the ladder was about 40 to 60 ft. from the east end of it, and we were working back within about 35 ft. of the west end of it; therefore, it would be about a fraction over 100 ft., I should judge.

Q. A fraction over 100 ft. from the place where you were working to the ladder where you went down?

A. Yes, sir. [116—90]

Q. How far was the ladder where you went down from the end of the tunnel where the train entered, coming from Kennecott?

A. You mean the tunnel proper or the cave-in?

Q. I mean the place where she whistled.

A. The ladder would be about 220 ft. west of the

(Testimony of W. H. Slimpet.)

east entrance to the tunnel.

Q. Then the train would have to come some 200 ft. and you would have to go 100 ft.?

A. Yes, sir; something over 100 ft.—that is about right.

Q. Do those trains run slowly or rapidly through that tunnel?

A. At a very ordinary speed, not fast and not real slow—it depends on the condition of the track; they were not going at a very fast speed.

Q. How fast would you say?

A. I would have to be out where I could see them to make an estimate.

Q. You saw the smoke coming up and it was traveling as fast as the train?

A. Yes; it wouldn't take but a very short time to run the length of this cave-in.

Q. Was it running six miles an hour?

A. I wouldn't make an estimate on it at all.

Q. Didn't they usually go through there very slowly?

A. They went through slow—six miles an hour is slow.

Q. They were coming up a steep grade?

A. Not when they were in the tunnel—as I said, I believe it is one-half of one per cent in the tunnel.

Q. Don't you always go through a tunnel slowly?

A. Always, yes.

Q. And didn't they always go through there slowly?

A. Yes—six miles an hour is slow. [117—91]

(Testimony of W. H. Slimpet.)

Q. You say you spoke to Mr. Forrester about the light and got a light off of a dinky engine?

A. You got that wrong. We were talking about a light and I don't remember whether I spoke to him that particular day about the light or he did, but he mentioned the fact that there was one on a dinky engine that was down below the depot, and I went down, and whether that was the time or not, but we did not have a light off the dinky engine?

Q. What day was that?

A. I don't remember.

Q. Was it before or after the accident?

A. I don't remember the exact date when we got it, but we did have a headlight off the dinky engine; I remember that.

Q. If you did get a light, what did you do with it?

A. Took it up in the tunnel—timber handling and flooring, being lots of motion, would upset a lantern and break the globe.

Q. You think he got you a light off of one of the engines? A. I took the light up.

Q. Where did you put it?

A. I sent it up on a hand line up in the tunnel.

Q. What is a hand line?

A. An ordinary piece of rope you use in raising and lowering light objects.

Q. Why didn't you put it at the end of the tunnel?

A. We were working up above.

Q. Why didn't you put it out where Heney fell down?

A. That wasn't what we got it for; we got it to

(Testimony of W. H. Slimpet.)

work by. Up to that time we were working further up ahead in the tunnel nearer where the ladder was.

[118—92]

Q. You don't want the jury to understand that you were foreman than on that work at that time?

A. No, in the timber work, no—I never said I was, no, sir.

Mr. BORYER.—That is all.

Redirect Examination.

(By Mr. RITCHIE.)

Q. Did you do any work there except under orders from Mr. Forrester or his foreman? A. No, sir.

Q. When this particular train came through, did you have time after you first noticed it coming to reach the ladder and get down?

A. I don't think we would have had time, if we started immediately after the train whistled, to have got to the ladder.

Q. Where was the train when it whistled?

A. It was about the portal of the tunnel, as near as I can judge. It whistled and immediately after that it was in the tunnel.

(By Mr. BORYER.)

Q. Did you try to get to the ladder?

A. No, sir; I did not, personally.

Q. You don't know how fast the train was running? A. I believe I made the remark I did not.

Q. Then you don't know whether you could have gotten to the ladder or not?

A. No, I have never made the attempt.

Q. Why didn't you go?

(Testimony of W. H. Slimpet.)

A. As a rule, when the train was in the tunnel we had very little time to get any place and the floor was bad in some places—we had to go past some of these hatch-holes that were not very well covered, and I thought the best thing to [119—93] do was to stay where we were at.

Q. Mr. Heney testified they were covered?

A. They were covered in a way—sometimes they were covered solidly and sometimes only partly.

Q. There were four of you working there?

A. Yes, sir.

Q. If you saw that hatch open it would be your duty to cover it?

A. The hatch we had just got through covering.

Q. Had you covered that?

A. Whenever we had lumber to cover them with, we covered them.

Q. You covered this one well?

A. We had lots of lumber.

Q. Do you know whether the others were covered?

A. Some of them were covered a few times, but at that particular time, I don't know.

Q. Had you been working around the others?

A. Various times—one day we worked one end and another day we were working at another, whenever the foreman sent us.

Witness excused. [120—94]

[Testimony of Henry Adler, for Plaintiff.]

HENRY ADLER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Henry Adler.

Q. Where were you working in December, 1911, and January, 1912? A. In the Chitina tunnel.

Q. With whom were you working?

A. I was working for the Copper River & Northwestern Railroad.

Q. With what men were you working?

A. With Heney and Mr. Slimpet and another man, I don't know his name—we called him Shorty that time.

Q. And you say you were working for the Copper River & Northwestern Railway Co.? A. Yes, sir.

Q. From whom did you get your pay?

A. I don't know. I never took any notice of the checks I got.

Q. What were you doing generally?

A. We were timbering and lagging the tunnel.

Q. How was that tunnel lighted, if at all, in December, 1911, and the early part of January, 1912.

A. Well, we had two big carbide lights for a time and later on we only had some gasoline torches, and we ran out of gasoline that time and only had coal oil lights—common lanterns.

Q. Do you remember the day Heney was hurt?

A. Yes, sir.

Q. Who was working up there that day?

(Testimony of Henry Adler.)

A. Billy Slimpet was working there and Heney and this other man—I don't know his name—and myself. [121—95]

Q. How many lights, and what kind of lights did you have up there that evening?

A. We had some coal-oil lanterns.

Q. Small hand lanterns? A. Yes, sir.

Q. How many did you have?

A. Two or three—I am not sure.

Q. Do you know anything about a hole extending clear across the roof of the tunnel proper?

A. Yes, sir.

Q. How far was that from the entrance to the tunnel, the Chitina end?

A. I should judge about 30 ft.

Q. Do you remember what time of the day Heney fell and was hurt?

A. I don't know—I don't remember the date.

Q. Do you remember the time?

A. It was in the afternoon between 2 and 4—I am not sure.

Q. Just before he fell through that hole—how far were you working from that hole?

A. From the place where he fell?

Q. Yes.

A. About 35 ft.—between 25 and 35 ft.; I couldn't be sure.

Q. And you had three lanterns at that time?

A. Yes, sir.

Q. Were you familiar with the hole in a general way—you knew it was there?

(Testimony of Henry Adler.)

A. Yes, sir; I know it was there.

Q. Did you ever have a guard-rail around that hole at any time? A. Not in my time.

Q. On either side of it? [122—96]

A. No, sir.

Q. Did you ever have a light at it?

A. No, sir; not that I remember.

Q. Just before Heney fell, did any train come through that tunnel?

A. Yes, the train went through just before he fell, I guess,—I didn't see him fall.

Q. Coming from which way? A. Kennecott.

Q. Was it a loaded train? A. I am not sure.

Q. What was the effect of that train passing through, if you know?

A. The smoke came up pretty thick.

Q. And after the train went through and the smoke was there, what effect did it have upon your ability to see things?

A. You couldn't see anything for quite a while.

Q. What did you do?

A. We just waited so the smoke would clear away.

Q. Where did you come up to the platform to work at that time? A. Came up on a ladder.

Q. How far was that from where you were working?

A. 100 or 115 ft., something like that; I am not sure.

Q. The ladder came up through the hatch?

A. Yes, sir.

Q. When did you get word that Heney had fallen?

(Testimony of Henry Adler.)

A. It was a few minutes after the train went through, somebody hollered below to watch out up there and be careful, somebody dropped through.

Q. And what did you do then?

A. We went to look for the ladder and when we found the ladder [123—97] we went down.

Q. And did you see Heney when you got down there? A. Yes, sir.

Q. Where was he and what condition was he in?

A. Likits and the blacksmith, I don't know his name, were holding him up.

Q. Did you help take him up to the house?

A. I was there but Likits and another man had him and tried to carry him up in a canvas bunk but he couldn't stand that and they had to carry him up there.

Q. How far could you see through that smoke with one of these lanterns you had?

A. For a while you couldn't see anything.

Q. If one of these lanterns or one similar to it had been hung up at the place where Heney fell through, could you have seen it on approaching it?

A. You would have to be pretty close to it.

Q. You could have seen it before you reached it?

A. Yes, sir.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. Do you know how dark it was when Heney fell off, at the time he fell off?

A. No, sir, I do not.

(Testimony of Henry Adler.)

Q. Then do you know if you could see a light or not?

A. If it was just as dark as where we were standing, he had to be pretty close to it to see the lantern.

Q. You think the darkness was just the same at the point where he fell off, as where you were?

A. I expect so.

Q. You are not sure? [124—98] A. No.

Q. Could you see your lantern?

A. Yes, you could see it—I could just see the light of it, that is all.

Q. You took your lantern to find the ladder hole as soon as you heard this cry? A. Yes, sir.

Q. And you went down the ladder with your light?

A. Yes, sir.

Q. And you found your way to the ladder with your light? A. Yes, sir.

Q. And you started just as soon as you heard this cry?

A. Yes, we started out to find the ladder.

Q. Then, as a matter of fact, you started for the ladder just as Heney fell down?

A. No, as soon as somebody hollered—I don't know when Heney dropped.

Q. As soon as somebody hollered you started?

A. Yes, sir.

Q. And you found the hole with your lantern?

A. Yes, sir.

Q. What were you doing when you heard this cry?

A. Wasn't doing anything.

Q. Standing still? A. Yes, sir.

(Testimony of Henry Adler.)

Q. Why were you standing still?

A. Because we couldn't see anything.

Q. Had you been instructed to stand still or what instructions, if any, did you have in regard to your work there when trains went through?

A. Well, on one occasion Mr. Forrester instructed me something [125—99] like that.

Q. What did he tell you?

A. He told me when the smoke was pretty thick to stand still.

Q. To stand still and not work? A. Not work.

Q. And what about coming down out of the top?

A. You mean coming down when the smoke was thick?

Q. Yes. A. Didn't say anything to me.

Q. It wasn't necessary was it for you to come down?

A. Never gave me any orders about that.

Q. It wasn't necessary for you to come down just so you stood still—that was all that was necessary?

A. Sometimes we went down.

Q. Why did you go down?

A. We went out in the yard and worked there awhile until the train came back.

Q. Why did you go down?

A. Because the smoke was thick in there and you couldn't work and couldn't see.

Q. Did you leave before the train went through or after?

A. Sometimes we left before the train went through.

(Testimony of Henry Adler.)

Q. How did you know the train was coming through?

A. Mr. Forrester knew it, I guess.

Q. Was Mr. Forrester there to tell you the train was coming through?

A. Sometimes he did.

Q. How would he know?

A. He ought to,—he is an official of the company and he ought to know.

Q. How does he know when they run the trains?
[126—100]

A. He found it out from the depot.

Q. Was he upstairs when he told you?

A. Yes, he came up and told the foreman.

Q. He would hear the whistle, would he?

A. No, he would come up before the whistle would blow.

Q. And tell you to come down?

A. Yes, to work in the yard.

Q. Where was Heney standing when you heard the whistle blow? A. I don't know.

Q. Was he standing close to you?

A. No, I could hear him working but I don't know where he was at the time.

Q. Now, then, you and Slimpet were working there together sawing these boards? A. Yes, sir.

Q. Where was Shorty?

A. Shorty was right behind me scratching—measuring, I mean.

Q. Could you hear all of the conversations that took place between you and Slimpet and the other

(Testimony of Henry Adler.)

men there—between Slimpet and the other men?

A. I think I could have heard anything.

Q. How far apart were you?

A. Shorty was about 8 ft. from me, I should judge.

Q. And what was he doing?

A. He was measuring.

Q. You and Slimpet were sawing? A. Yes, sir.

Q. There was nobody else up there at the time?

A. No, sir.

Q. Nobody else around there?

A. Yes, there was one man down below. [127—
101]

Q. They were not working with you people?

A. No, sir—yes, in a way—Mr. Likits was working with us in a way.

Q. Down below?

A. Down below—he was loading the lagging.

Q. How far away from you was Likits?

A. About thirty feet, I guess.

Q. About 30 ft. below? A. Yes, sir.

Q. Did you hear anyone tell Heney to go over there and put in this brace? A. No, sir, I did not.

Q. You were there with Slimpet and Shorty?

A. Yes, sir.

Q. And if anyone had told him to do that, you could have heard it, could you not, either one of these three men?

A. I might and might not have taken any notice of it.

Q. But there was nobody else there but you four boys, working there? A. No, sir.

(Testimony of Henry Adler.)

Q. How long did it take you, after you heard this cry, before you got down?

A. A few minutes.

Q. You had to go over to the ladder, crawl down the ladder and then come back? A. Yes, sir.

Q. About, would you say, a minute or two?

A. Two or three minutes.

Q. Who went down with you?

A. We all went down that time. [128—102]

Q. Slimpet went down with you? A. Yes, sir.

Q. And Shorty went down with you?

A. Yes, sir.

Q. Did you all go down the ladder about the same time?

A. I was the first man to go down and the rest of them followed as soon as they got to the ladder, I guess.

Q. Did you have any trouble getting to the ladder?

A. Yes, it was pretty hard to find.

Q. Did you have a lantern?

A. Yes, sir, I had a lantern.

Q. How long did it take you to get to the ladder?

A. A minute or two.

Q. How long did it take you after you got down the ladder?

A. It wouldn't take very long—it was light below, you could see where you were going.

Q. Did you take your lantern below?

A. Yes, sir.

Q. You were working for the Katalla Company then? Drew Katalla Company checks?

(Testimony of Henry Adler.)

A. I don't know what kind of checks I drew that time—I know I worked for the Railroad Co.

Q. You don't know what company it was?

A. No, sir.

Q. You don't know who you were working for?

A. I don't know whether it was the Katalla Company or the Copper River & Northwestern Railway Co.

Q. But when you state that you were working on the Copper River & Northwestern, you mean that you were working on the roadbed that they call the Copper River & Northwestern roadbed? [129—103]

A. I suppose so.

Q. But you don't know whom you were working for? A. No, sir.

At 3:50 recess to 4.

Court reconvened at 4 P. M. Jury all present.

Continuation of Cross-examination of HENRY ADLER.

(By Mr. BORYER.)

Q. At the time you were using these lights—that is, the large lights—they were taken down to Bridge 75A, were they? A. Yes, sir.

Q. And then you used the torches, did you?

A. Yes, sir.

Q. And you say you ran out of gasoline?

A. Yes, sir.

Q. The road was tied up then, was it?

A. I don't know—I am not sure. It might have been—I am not sure.

(Testimony of Henry Adler.)

Q. Were there any trains running into Chitina from Cordova?

A. I think there was at that time.

Q. On the 19th of January you think there was?

A. Yes, sir.

- Q. Are you certain of that?

A. I am not certain but I think so.

Q. Aren't you certain that they were not?

A. I couldn't say.

Q. The bridge had not been repaired yet, had it, Bridge 75A? A. I think it was.

Q. Are you certain?

A. No, I am not certain.

Q. Were you not out of gasoline in the town of Chitina?

A. We didn't have any gasoline in the blacksmith-shop—that [130—104] is where we always got it from.

Q. What kind of lights were you using in the town of Chitina?

A. Some use coal-oil and some use gasoline.

Q. Were they using gasoline then in the town?

A. I think so, I am not sure.

Mr. BORYER.—That is all.

(By Mr. RITCHIE.)

Q. When Mr. Forrester was around the tunnel there superintending the work where would he put in his time, did he have any particular place to stay or was he back and forth?

A. He would be out in the yard or inside the tunnel.

(Testimony of Henry Adler.)

Q. Do you know why he was able to learn sometimes of the approach of a train quicker than you could up there? A. I guess he could.

Q. Why?

A. I guess he could find out in the depot.

Q. Did he sometimes go further toward the Copper River than you were working?

A. No, I don't think so—we didn't work in the other end of the tunnel then.

(By Mr. BORYER.)

Q. Trains were passing through there daily?

A. About three times a week, I think.

Q. You knew they were running trains through there? A. Yes, sir.

Q. The smoke from these trains, sometimes it would be blacker than other smoke?

A. Yes, sometimes it would be pretty black and other times it would not be so bad.

Q. Do you know whether they were burning oil or coal at that [131—105] time?

A. I don't remember. I think it was coal.

Witness excused.

[Testimony of Chris. H. Likits, for Plaintiff.]

CHRIS H. LIKITS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Chris H. Likits.

Q. Where do you reside? A. Kennecott.

Q. What are you doing now—at this time?

(Testimony of Chris. H. Likits.)

A. Carpenter.

Q. Where are you working? A. Kennecott.

Q. At the Kennecott Mines?

A. No, down below at the lower camp.

Q. For the Kennecott Mines Company?

A. Yes, sir.

Q. Where were you working in January, 1912?

A. In Chitina.

Q. At what were you working?

A. Framing timbers for the Chitina tunnel.

Q. Do you know the plaintiff in this case?

A. Yes, sir.

Q. Do you remember the circumstance of his being hurt by a fall in the Chitina tunnel, about the middle of January, 1912? [132—106]

A. Yes, sir.

Q. Were you around at the time he fell, close by?

A. Yes, sir.

Q. Tell the jury what you saw there.

A. Well, I was standing about seven or eight sets of timbers from the Chitina end, towards Kennecott, and the train had just passed and there was pretty much smoke in there, and I was waiting until the smoke cleared up and I heard something fall. I couldn't see then and I sat down and looked along the track. The smoke had raised from the track and I could see there was somebody on the track and I ran over and picked Heney up, and we carried him home.

Q. Did you see him as he fell or a moment afterwards?

(Testimony of Chris. H. Likits.)

A. No, I didn't see him fall but I heard him falling.

Q. How far away were you?

A. About seven or eight sets of timbers—the timbers are four feet apart.

Q. What were you doing at that time?

A. I was standing between the timbers, waiting for the smoke to get out.

Q. Was it pretty dark there?

A. Yes, it was pretty dark.

Q. Was it rendered more dark by the smoke?

A. Well, it was pretty dark; yes, sir.

Q. What time in the day was this?

A. I don't know what time of the day it was—it was in the afternoon some time.

Q. Was it still light outside?

A. Yes, sir, there was lots of light outside.

Q. Had it begun to get dark?

A. No, sir. [133—107]

Q. You say you heard Heney fall?

A. Yes, I heard him land on the ground.

Q. And you went up to him?

A. Yes, I heard the lantern he had in his hand—he kicked it down. I heard the glass jingle at the time.

Q. In what position did you find Heney?

A. He was lying on the right side, facing Chitina.

Q. Facing toward Chitina? A. Yes, sir.

Q. Was he conscious?

A. He didn't say a word when I took him up. I said something about it but he never answered me.

(Testimony of Chris. H. Likits.)

Q. When did somebody else come to your assistance, how soon after that?

A. I don't know, I couldn't say how soon—it wasn't very long.

Q. Who was the first man that came?

A. I think the blacksmith just fetched a sharp saw into the tunnel, just happened to come into the tunnel at the time—he was filing saws for us and he was the first one to help me.

Q. And then all the men came from above?

A. Yes, sir.

Q. And what did you do with Heney then?

A. We carried him home.

Q. From where you picked him up?

A. Yes, sir.

Q. How long was it before he recovered consciousness?

A. Before we got out of the tunnel—we laid him down on the track and we took him about 50 ft., I guess. We were about in front of the tunnel, the portal, when we laid him down.

Q. Did he recover consciousness while he was lying there? [134—108] A. Yes.

Q. So he could talk?

A. He didn't talk, he just grunted—he was suffering with pain, I guess.

Q. Who carried him?

A. I was one and John Ard and then we changed off—I think Mr. Slimpet took hold afterwards.

Q. You went all the way to the house?

A. Yes, sir.

(Testimony of Chris. H. Likits.)

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. What period of the afternoon was it?

A. About the middle of the afternoon, I guess.

Q. Were you using a light below? A. No, sir.

Q. To work below? A. No, sir.

Q. Was it necessary to use a light above?

A. Yes, they had been using lights all through the day above.

Q. Always used a light up above? A. Yes, sir.

Q. Where was the train when you heard it?

A. I heard it whistling way down—I heard it whistling maybe two or three hundred yards before she came into the tunnel.

Q. Was she ringing her bell too?

A. She started to ring the bell before she entered the tunnel.

Q. You heard her whistle two or three hundred yards before she got to the tunnel?

A. Yes; if a man happens to be on the track he can hear her coming over the Copper River bridge.

[135—109]

Q. Now, then, you were further up toward the other end of the tunnel than Heney and Slimpet and Henry, were you not?

A. No; I guess I was about in the same place—that is where we were sending up timbers and lumber there, about the same place. I can't recall exactly where I was standing.

Q. Where were you standing when you heard the

(Testimony of Chris. H. Likits.)

whistle blow in relation to the place where Heney fell down?

A. Well, I was standing about the middle of the tunnel at the time I heard the whistle blow the first time, and there was a teamster there with a horse, and I sent him out and helped take the props off the car, and then I came back to the tunnel and then the train came in at the other end and I squeezed myself between the timbers and let the train pass by.

Q. Then you sent the teamster out with his team?

A. Yes, sir.

Q. How far did he have to go to get out?

A. About 200 yards, maybe.

Q. And then did you walk?

A. I walked back again to the tunnel.

Q. You went clear out with the teamster and came back to where they were working? A. Yes, sir.

Q. Do you recall if the trains were running from Cordova to Chitina at that time?

A. No, I don't know whether they were or not.

Q. Wasn't that the time that the road was tied up by reason of the accident down at the bridge 75A?

A. Yes, but I don't know whether they were through at the bridge or not—I don't remember whether they were through or not, but I don't think they were. [136—110]

Q. They were tied up there for about three or four weeks? A. Yes, sir.

Q. Do you recall what lights they were burning in Chitina at that time? A. In the Chitina town?

Q. Yes. A. Gasoline lights.

(Testimony of Chris. H. Likits.)

Q. Do you know if they were out of gasoline in the town? A. No, I do not.

Q. Do you know whether or not they were out of coal oil in the town? A. I don't know that either.

Q. Did you ever hear, or have any instructions there regarding your work when trains were passing through the tunnel? A. Yes, sir.

Q. You say you did hear instructions?

A. Yes, sir.

Q. What was it?

A. Mr. Forrester told us, when Mr. Kilsen was there and was complaining of the smoke one day, Mr. Forrester said, if it gets too thick with smoke, to sit down and quit working or go downstairs.

Q. He told you to quit working?

A. Yes, he told us to quit working or go down—who wanted to stay up there, to stay up there and who wanted to go down, to go down.

By the COURT.—Was Mr. Heney there at that time?

A. I don't know.

Mr. RITCHIE.—We move to strike it out.

By the COURT.—It may stand. Of course it wouldn't be binding on Heney unless the jury find that Heney received such [137—111] instructions.

Q. Where were you at the time Mr. Forrester told you this?

A. I was right about in the middle of the tunnel, upstairs, at that time.

Q. Who else was working up there?

A. A man named John Locker and Bill Kilsen—

(Testimony of Chris. H. Likits.)

I heard somebody make the remark, call him Shorty.

(By Mr. RITCHIE.)

Q. Where were you standing when the train passed?

A. I was standing six or eight sets of timbers from the Chitina end, that is, on the new sets.

Q. Inside the tunnel? A. Yes, sir.

Q. Did you notice how many cars that engine was hauling? A. No, sir.

Q. Or whether they were loaded or not?

A. No, sir—I guess they had ore.

Q. They were ore cars? A. I think so.

Q. About how many cars do you think there were?

A. I don't know.

Witness excused. [138—112]

[Testimony of J. W. Forrester, for Plaintiff.]

J. W. FORRESTER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. You reside at Chitina? A. Yes, sir.

Q. What position, if any, do you hold with the Copper River & Northwestern Railway Company at this time? A. Roadmaster, now.

Q. What position, if any, did you hold with the company in January, 1912?

A. Resident engineer.

Q. You have been familiar with the railroad up there for several years, have you not?

A. Yes, sir.

(Testimony of J. W. Forrester.)

Q. What is the grade coming up from the Copper River bridge to the Chitina tunnel?

A. It is $2\frac{1}{2}\%$, if I remember correctly, from the Chitina bridge to a point about six or seven hundred feet from the east portal of the Chitina tunnel.

Q. And then there is a very much less grade?

A. Yes, then it is one-half of one per cent.

Q. Do you remember the day Heney was hurt?

A. Yes, sir.

Q. About the 19th day of January, 1912?

A. Yes, sir.

Q. At that time was the Copper River & Northwestern Railway Co. doing a traffic business from Cordova to Chitina and beyond, along the Copper River?

A. No, sir, the road was tied up from Cordova to Chitina at that time.

Q. I mean was it engaged in business as a railroad carrier except [139—113] when it was stopped by accidents at that time?

A. They were running trains from Cordova to Chitina at that time.

Q. The Copper River & Northwestern Railway Co. was running trains, carrying freight and passengers, from Cordova to Kennecott, except when the road was blockaded?

A. Yes, sir, the railroad was.

Q. The railroad was carrying them?

A. Yes, sir.

Q. Some of these men that were doing work,—possibly all the work that was being done in the Chi-

(Testimony of J. W. Forrester.)

tina tunnel was done by the Katalla Company, was it not? A. I don't know.

Q. Was the Katalla Company ever anything but a construction company for the Copper River & Northwestern Railway Co. and during the time of construction operating the railroad for the Copper River Company?

A. I know we received Katalla Company checks during construction—I don't know anything about the companies, though.

Q. You have seen the waybills that they used, have you not? A. Yes, sir.

Q. I will ask you whether those are the ones that were used. (Handing witness paper.) That is the form they used?

A. That is the form of the waybill that they used to the best of my knowledge, yes, sir—I wouldn't be positive about it.

Mr. RITCHIE.—This is an exhibit in another case and I would like to read the printed heading of this into the record.

Mr. BORYER.—We object to it for the reason that this bill of lading is under date of March, 1911, and for the reason that it is possible that either the Katalla Company or the Copper River & Northwestern Railway Co. may have been doing [140—114] business in March, 1911, at the time this bill of lading is dated and may have gone out of business before the date of this accident.

Objection overruled. Defendant allowed an exception.

(Testimony of J. W. Forrester.)

Mr. RITCHIE.—I will read the printed heading of this—Katalla Company. (Constructing and operating Copper River & Northwestern Railway Co.) Straight bill of lading—Original. On the usual printed form.

Q. I will also ask you whether the Copper River & Northwestern Railway Company has been in continuous operation, except when blockaded by accidents, since it began operations, beyond Chitina, about the fall of 1910—that is, whether it has been carrying freight and passengers since some time in the fall of 1910, about that time, except when blockaded?

A. There has been trains running over the railroad carrying freight and passengers—I don't know what company it would be, though.

Q. Can you state whether or not when they ceased to use this bill of lading, Katalla Co., and adopted the present one—whether they continued to use this until they adopted the present form, Copper River & Northwestern Railway Co.?

A. I have no knowledge of that whatever, I couldn't testify.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. I will ask you if they are not still using this same bill of lading, the same form.

A. I couldn't say.

Mr. RITCHIE.—I will admit it, if you say they are using it.

(Testimony of J. W. Forrester.)

Q. Now, as a matter of fact, do you know anything in regard to [141—115] the business relations or connections between the Katalla Company and the Copper River & Northwestern Railway Co.?

A. I do not.

Q. You have never seen any of their contracts?

A. No, sir.

Q. Do you, as a matter of fact, know whether the Katalla Company is operating this road at the present time or not or if the Copper River & Northwestern Railway Co. is operating the road at this time?

A. I don't know; no, sir. I couldn't testify.

Q. You know there are trains running up and down this road? A. Yes, sir.

Q. You know that freight and passengers are being carried up and down this road?

A. Yes, sir.

Q. You don't know who has the license to operate this road? A. No, sir.

Q. I will ask you if you know that the articles of incorporation of the Katalla Company provide that it can do a common carrier business?

A. I don't know anything about it.

Q. I will ask you if you don't know or if you do know if the Copper River & Northwestern Railway Co. has a license to do a common carrier business over this particular line?

A. I don't know whether they have or not.

Q. I will ask you from whom you were drawing your checks at that time?

(Testimony of J. W. Forrester.)

A. The Katalla Company, to the best of my recollection—I couldn't say positively.

Q. On your direct examination Mr. Ritchie asked you what was [142—116] your position with the Copper River & Northwestern Railway Co. at that time, and you stated you were resident engineer—do you know if you were resident engineer for the Katalla Company or for the Copper River & Northwestern Railway Co. at the time?

A. I was resident engineer on the railroad; that is all I know about it.

Q. You don't know, as a matter of fact, whom you were working for? A. No, sir; I do not.

Q. Mr. Ritchie asked you whether the railroad company was doing a common carrier business and I believe you answered in the affirmative. I will ask you if you knew or if you know now whether it was the Katalla Company that was doing a common carrier business, or if it was the Copper River & Northwestern Railway Co. that was doing a common carrier business?

A. No, sir; I don't know which company it is.

Q. It wasn't your intention to tell the jury that you knew which one was, or if either was doing a common carrier business?

A. I know the railroad handles freight and passengers—I don't know which company it is.

Q. That freight is carried up on trains?

A. Yes, sir.

Q. But whether it is a company, corporation, individual or who it is, you don't know?

(Testimony of J. W. Forrester.)

A. No, sir.

Witness excused. [143—117]

[Testimony of M. V. Lattin, for Plaintiff.]

M. V. LATTIN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. M. V. Lattin.

Q. What position do you occupy?

A. Station agent.

Q. For what railroad company?

A. Copper River and Northwestern.

Q. You are now stationed at McCarthy or near there? A. Yes, sir.

Q. Were you formerly stationed at Chitina?

A. No, sir.

Q. Did you formerly work at Chitina?

A. No, sir.

Q. Where did you work before you went to McCarthy? A. Cordova.

Q. When were you working at Cordova?

A. A year and a half ago.

Q. Were you working in Cordova in January, 1912, and prior to that time?

A. I went to McCarthy as agent November 15, 1911, I believe it was.

Q. And you have been there ever since?

A. Yes, sir.

Q. And prior to that for a considerable time you were employed here?

(Testimony of M. V. Lattin.)

A. But not as agent here. I was in the train service and in the shops.

Q. Since you have been at McCarthy, you have sold tickets to passengers? [144—118]

A. Yes, sir.

Mr. BORYER.—When did you say you went to McCarthy?

A. November, I believe it was; 15th to 20th, 1911.

Q. You have been selling tickets to passengers at McCarthy ever since that, to passengers that traveled over the line? A. Yes, sir.

Q. How do those tickets read that you sell to passengers?

Mr. BORYER.—We object to that for the reason that it is not the best evidence.

By the COURT.—If he has any with him, he can use them; if he has not, he can give his best memory.

A. They have read the Katalla Company for, I believe, up to probably six months ago. I got a Northwestern ticket then.

Q. Prior to that time, didn't they have the words C. R. & N. W. on them? A. No, sir.

Q. Didn't have that at all on them? A. No, sir.

Q. The Katalla Company wasn't selling the ticket?

A. Yes, sir; we are selling, using the same thing yet, that is, in the half fare form.

Q. How did the waybills read up to a few months ago for freight, that is, the heading? I will ask you if that is the present form (handing witness paper).

A. This is the bill of lading.

(Testimony of M. V. Lattin.)

Q. Is that the present form in use?

A. We are using that at present.

Q. And prior to the time you began using that, did you have a form with the Katalla Company at the head of it? A. Yes, sir. [145—119]

Q. It read, The Katalla Company, Constructing and Operating the Copper River & Northwestern Railway Company? A. Yes, sir.

Mr. BORYER.—We move to strike the answer, and I want an exception, for the reason that the bill of lading says, Katalla Company Operating and Constructing the Copper River & Northwestern Railway Company; the fact that the Katalla Company was constructing does not show that there was any relation between the Katalla Co. and the Copper River & Northwestern Ry. Co., because the Katalla Company might have been an independent contractor.

Objection overruled and motion to strike denied.

Defendant allowed an exception.

Mr. RITCHIE.—That is all.

Mr. BORYER.—That is all.

Witness excused. [146—120]

[Testimony of Thomas S. Scott, for Plaintiff.]

THOMAS S. SCOTT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Thomas S. Scott.

Q. You are deputy clerk of the district court for the Third Division, Alaska? A. Yes, sir.

(Testimony of Thomas S. Scott.)

Q. How long have you held that position?

A. Since May, 1909.

Q. Is the Clerk of the District Court the custodian of the papers required to be filed by foreign corporations doing business in Alaska?

A. For this division, yes, sir.

Q. Is the Clerk of the court for the Third Division the custodian of all the papers filed by foreign corporations doing business in this division?

A. Yes, sir.

Q. Among those corporations, is the Katalla Company one? A. Yes, sir.

Q. State what those papers are (handing witness papers).

A. They seem to be numerous corporation papers of the Katalla Company, among which are original articles and yearly statements.

Q. Have you the articles there—a copy of the articles filed?

A. It is called certificate of incorporation; I presume that is the one.

Q. Get out the statements for 1911 and 1912.

Mr. RITCHIE.—Mr. Boryer, will you admit that the Katalla Company was incorporated for the purpose of constructing, incorporated under the laws of New York and doing business in Alaska as a construction company and for the constructing [147—121] of railroad and—

Mr. BORYER.—I admit that it was a construction company, organized for the purpose of constructing railroads.

(Testimony of Thomas S. Scott.)

Q. Have you found the statements for 1911 and 1912? A. Yes, sir, here they are.

Mr. RITCHIE.—I want to read into the record part of that paragraph (handing to Mr. Boryer). We plead that the Katalla Company is the agent of the Copper River & Northwestern Railway Co., doing certain work for it of which the public is not fully informed. I want to read what the company says about its own assets.

Mr. BORYER.—I have no objection to that.

Mr. RITCHIE.—This is the statement for 1911. The fifth paragraph recites that the assets of said corporation consist of contract for building a railroad in Alaska, material on hand and claim against R. R. Company for work already performed, which under the terms of contract is not yet payable. The fifth paragraph in the statement for 1912 reads: The assets of said corporation consist of contract for building a railroad in Alaska, material on hand, and claim against Railroad Co. for work already performed, which under the terms of contract is not yet payable.

Mr. BORYER.—We object to the introduction, for the reason that the statements as read from the papers do not show that these assets were assets of the Copper River & Northwestern Railway Co. and do not designate or say what assets it is or what railroad.

Mr. RITCHIE.—I think we will connect it up by other testimony.

(Testimony of Thomas S. Scott.)

By the COURT.—It may be admitted.

To which ruling of the Court counsel for defendant is allowed an exception. [148—122]

Q. As deputy clerk of the Court, do you know whether or not the Copper River & Northwestern Railway Co. is paying a license to operate a railroad as a common carrier from Cordova to Kennecott or thereabouts? A. It does.

Q. And how long has it been doing so?

A. Well, the first time it secured a license, it secured it for a certain number of miles, and my recollection is that they have increased the length of their road—they took out an additional license each time.

Q. How long has it had a license to operate beyond Chitina?

A. I couldn't tell you from memory.

Q. Has it been during the past two years?

A. I couldn't tell, I am sure.

Q. Do you know whether they have paid the license for at least two years?

A. They have paid a license for at least two years, I know.

Q. You don't know how far it extends?

A. I don't know; no.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. I will ask you to turn to the certificate of incorporation of the Katalla Company, on page 3, and ask you if this is the copy of the articles that was

(Testimony of Thomas S. Scott.)

introduced in evidence by the plaintiff.

A. The same copy.

Q. I will ask you if that is the articles of incorporation of the Katalla Company.

A. It is; yes, sir.

Q. I will ask you to read from page 3 the proviso found there. [149—123]

A. Provided, however, that nothing herein contained shall be construed as including in the business or purpose of the corporation the transaction of the business of banking or to constitute the corporation a railroad corporation or transportation corporation.

Q. Now, I will ask you if you have ever, if the clerk's office has ever issued a license to the Katalla Company to do a common carrier business?

A. My recollection is that all those licenses were issued to the Copper River & Northwestern Railway Co.

Q. And none to the Katalla Company?

A. Not that I remember.

Q. I will ask you if all of the licenses for the operation of this road have not been granted to the Copper River & Northwestern Railway Company.

A. To the best of my recollection they have; yes, sir.

Mr. BORYER.—That is all.

Witness excused.

Plaintiff rests.

Defendant files a motion for nonsuit on behalf of each of the defendants, which motion in each case is overruled and defendant is allowed an exception.

[150—124]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, and KATALLA COM-
PANY,

Defendants.

Motion [of Katalla Co.] for Nonsuit.

Defendant, Katalla Company, by its attorney, R. J. Boryer, moves the Court for a motion for a nonsuit in this case for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Katalla Com-

pany at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing [151] and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to make out a case against this defendant.

R. J. BORYER,

Attorney for Katalla Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 6, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy.
[152]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for
Nonsuit.**

Defendant, Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, moves the Court for a nonsuit in this action for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Copper River & Northwestern Railway Company at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that

all of the other [153] employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to make out a case against this defendant.

R. J. BORYER,
Attorney for Copper River & Northwestern Railway
Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 6, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy.
[154]

Defense.

[Testimony of J. W. Forrester, for Defendant.]

J. W. FORRESTER, recalled as a witness in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. Where were you working in December, 1911, and January, 1912?

A. Around the Chitina tunnel, mostly.

Q. What general work were you doing there?

A. We were timbering a portion of the tunnel that had caved in.

Q. Was Mr. Heney there? A. Yes, sir.

Q. What work was he performing?

A. When he first went to work he run a shift—he had a night shift of laborers hauling out dirt from this cave-in and later I put him to work cutting

(Testimony of J. W. Forrester.)

lagging in the woods, and when that was finished he went to work inside putting up timbers and lagging, etc.

Q. Do you recall an accident there on the 19th of January? A. Yes, sir.

Q. I will ask you if you also recall an accident that happened at Bridge 75A? A. Yes, sir.

Q. That was on the first of January?

A. Yes, sir.

Q. I will ask you if the accident at bridge 75A did not tie the road up so that no trains were run from Cordova to Chitina until after this accident on the 19th day of January. A. Yes, sir.

Q. I will ask you if you know what kind of light they were using in Chitina at that time and the supply of oil, etc. [155—125]

A. They were very short of gasoline, I know—there was plenty of coal oil in town, though.

Q. Do you know if the company had run out of gasoline? A. Yes, we had.

Q. Now, what instructions, if any, had you given the men working in this tunnel?

A. Why, I told them to come down out of the top of the tunnel when the trains came through and to work down below or work in the yard a few minutes until the smoke cleared away. I remember one time in particular that I walked out through the tunnel after the train had come through and it was very smoky and there was no work to do down below that day, and went up the ladder and asked the fellows why they didn't come down out of the smoke, and

(Testimony of J. W. Forrester.)

they said it was too cold—it was warm up above and the weather was 20° below and they would get wet, and they were all sitting down, waiting for the smoke to clear away, and I told them I remember numerous times, I have cautioned them, to keep still up there—if they didn't come down to stand still until the smoke cleared away. It was so dense a man couldn't see to work for a while at least after the train had gone through there.

Q. While you were working in that tunnel—can you hear the trains as they are approaching up the hill towards the tunnel?

A. If you are down on the track you can hear a train for a good distance, they make so much noise working up the hill—I don't know how far you could hear them above—you couldn't hear them so far.

Q. As a matter of fact, though, those trains would be heard as they come up the grade, when they get within 600 ft. of the tunnel? [156—126]

A. Yes, they slip all the way coming up the hill and make a good deal of noise.

Q. After the train gets up there and is going through the tunnel, do you think that any work can be performed there in the upper portion of the tunnel while the train is going through?

A. I don't believe a man could work up there for a few minutes after the train had gone through. I never saw anybody continue work there while the train was running through there—they always stopped and almost invariably came down until the smoke had cleared away. If they didn't come down,

(Testimony of J. W. Forrester.)

if it was too cold to come down, they always sat down or waited until the smoke did clear away.

Q. I will ask you if that was true when you had your large lights there. A. Yes.

Q. You couldn't see to work then?

A. No,—the stack of the engine would come within probably four feet of this floor and it would belch the smoke right up through there and it came up in a very dense volume and the men couldn't see to work up there.

Q. Were you there the day of the accident to Heney?

A. I was there in the forenoon—I hadn't been in the tunnel since noon that day.

Q. You were under Mr. Wernicke, were you not?

A. Not at that time, no, sir.

Q. Was there some one over you concerning that tunnel?

A. Mr. Geiger was superintendent at that time.

Q. And you were under Mr. Geiger?

A. Yes, sir.

Q. Did you see the accident? [157—127]

A. No, sir.

Q. Now, will you explain to the jury just how that floor was constructed and to what extent it was floored to the end of the tunnel, to the point where Heney fell off?

A. Well, this two-story timber work extended for a distance of 200 ft. and this opening where Heney fell off was at the Chitina end of this work; the other end was all closed. The floor was made out of 2 by

(Testimony of J. W. Forrester.)

12 or 3 by 12—I have forgotten which now—and they were cut so that they caught on the caps. The caps were 12 inches wide and the cross-section of the tunnel was 24 ft. wide, and this open place was about—it was narrower tunneling at the end where Heney fell down than it was the other end. I think it was probably 6 ft. wide at the corner where he fell and extended off in a triangular shape, probably 12 ft. wide at the other side. That was within about 20 ft. of the end of the tunnel, so when there was no trains coming through, the daylight shone right up through there, if it was very light—it would be like looking out of a window for instance to walk to the end of that timber—the track was below you and it was only 20 ft. to the daylight then and the light shone right in there, and there were three other hatches we used to haul timber up there.

Q. Explain what you mean by the opening there at that point.

A. Well, it is the opening where the tunnel started to cave in originally and there was some old timbers still standing there; there were four sets or five sets of old timbers still standing, right in the end of the tunnel; those were four feet apart—that would be 20 ft. from the outside of the tunnel into the open space where we started to erect the new timber. [158—128]

Q. In other words, that is the point that you start to retimber your tunnel in going back toward the Kennecott end? A. Yes, sir.

Q. And there was a space between that end and the

(Testimony of J. W. Forrester.)

other end toward Chitina of about 6 ft. on one side and about 12 ft. on the other?

A. I think it would be probably ten or twelve feet on the other side; yes, sir.

Mr. BORYER.—That is all.

Cross-examination.

(By Mr. RITCHIE.)

Q. You say that was near the entrance to the tunnel?

A. Yes, sir, this hole was about—well, probably it was 30 ft. from the daylight up to the timber, but to the nearest edge of the hole it would be about 20 ft.

Q. There is part of the timber structure, the timber of the tunnel, that extends out to the hole?

A. There is a shed that runs out through, yes, sir.

Q. That is pretty near solid?

A. It is now, yes, sir—it is all connected up with the tunnel timber.

Q. Wasn't it then?

A. No, sir, not at that time—at that time there was an opening probably about eight or ten feet wide.

Q. I mean this part of the tunnel which is outside of the hole, wasn't that part pretty closely closed up except for what cracks were in it?

A. No, sir, there was about eight or ten feet of a space open right over the top of that.

Q. How far was that from the entrance into the hole proper?

A. This hole led right up to the entrance to the hole. [159—129]

(Testimony of J. W. Forrester.)

Q. And how far is this hole Heney fell through from the edge of the hole as it now extends?

A. It would probably be about 30 ft.

Q. Do you think it is no more than that?

A. No, sir.

Q. Did you ever measure it?

A. Yes, there would be five sets in there; that would be 20 ft.—that would take you out to the portal of the tunnel and then I think on the outside, next to the set, is not more than ten or twelve feet—that would be 30 ft.

Q. What had this long gap across the tunnel been left for?

A. We pulled timber up there quite awhile and still had this portion to complete—that was the last work to be done on the tunnel.

Q. You expected to use it again?

A. Yes, to take up that shipment of timber.

Q. Did you ever put a rail there to guard that?

A. No, sir.

Q. And never hung a lantern on it? A. No, sir.

Q. That was January—it would get dark about 4 o'clock? A. Yes, sir; something like that.

Q. After that time it would be quite dark over that hole?

A. If there was no smoke in the hole, you could distinguish it very easily.

Q. Could you when it was completely dark outside?

A. I think so, yes—that was snow lying outside.

Q. You never had a light of any kind put up there

(Testimony of J. W. Forrester.)

to indicate its position?

A. No, only at the time that we were working right at that point—we had lights then. [160—130]

Q. Have you had much experience in tunnels?

A. I had some experience before I took that job—not very much.

Q. Is it not usually considered more safe to have a lantern, unless there is a railing, to have a lantern around any hole or shaft in a dark place?

A. My experience has been that men look out for themselves a great deal. Any holes that a man is liable to fall through like in the middle of a floor are generally covered.

Q. It is usual where the hole is in a dark place to either cover it or have a railing around it or have a light indicating its position?

A. For instance, the way we had the hatches there to raise the timber through, we had material there to cover them—those were generally in the middle of the floor where a man might walk into them.

Q. It would have been a very simple matter to put up a bar, something like a scantling, across the side of that—on the side where the men were working?

A. Yes, sir, you could wall it.

Q. It could have been very easily done?

A. Yes, sir.

Q. And you could have hung a small lantern there to indicate the edge of the hole? A. Yes, sir.

Q. That would have been taking a precaution which a man might well think of?

A. It would have been a precaution, yes, sir.

(Testimony of J. W. Forrester.)

Q. The trains could have been run around over the hill instead of through the tunnel while the men were working there?

A. They were for a long time, until the tunnel was opened.

Q. Wouldn't it have been safer for the work there if the trains [161—131] had been run over the hill until the tunnel was completed?

A. I don't think so.

Q. There was a good deal of time lost by running the trains through the tunnel by men having to quit there on account of the smoke? A. Very little.

Q. Did you have any positive orders that the men were to come down if the smoke was bad?

A. I told them during the time we were lagging the timbers, while there was work to do in the yard, they always came down, but afterwards they stayed there, of their own free will; they could have come down if they wanted to.

Q. You were never up there to know when the train comes in whether the sound is deadened?

A. Yes, sir, I have been up there. I don't think you could hear a train so far up there but you can always hear the train whistle.

Q. Do trains always whistle coming up the hill?

A. Yes, sir, twice.

Q. You don't know whether the men always carry out the instructions?

A. All the time I worked there I was pretty careful about that.

By Juror PEDERSEN.—Is this tunnel straight or

(Testimony of J. W. Forrester.)

has it some curves?

A. There is a curve in the Kennecott end of the tunnel.

Q. In the end where he was working?

A. No, it was the other end, the far end.

Q. The curve doesn't start until you get out of the portal?

A. The curve extends into the portal a short distance, a few feet.

Q. It doesn't curve much until you get out in the open cut? [162—132] A. No, sir.

Mr. RITCHIE.—That is all.

Witness excused.

Testimony closed. [163—133]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO., a Corporation, and THE KA-
TALLA COMPANY, a Corporation.

Defendants.

Trial [Continued].

Now, on this day, the trial of the above-entitled cause came on again regularly for trial; E. E. Ritchie appearing as attorney for the plaintiff; R. J. Boryer appearing as attorney for the defendants. Came the

jury, heretofore impaneled and sworn herein, and being called and each answering to his name and the defendants having rested on a prior day of this trial, and the plaintiff offering no testimony in rebuttal,

THEREUPON, defendants filed their separate motions for a directed verdict, which said motions were by the Court denied, to which order and ruling of the Court defendants except and exception is duly allowed.

WHEREUPON arguments were had by counsel for plaintiff and counsel for defendants, the jury was duly instructed as to the law in the premises, and retire in charge of their sworn bailiffs for deliberation.

Special April, 1913, Term—May '7th, 1913—24th Court Day.

Entered Court Journal No. C.-2, page No. 89.
[164]

*In the District Court of the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for
Directed Verdict.**

Defendant, Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, moves the Court for a Directed Verdict for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Copper River & Northwestern Railway Company at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke

ahead of him and that all of the [165] other employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to establish a case against this defendant.

R. J. BORYER,
Attorney for Copper River & Northwestern Railway
Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 7, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy. [166]

*In the District Court of the Territory of Alaska;
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, and KATALLA COM-
PANY,

Defendants.

Motion [of Katalla Co.] for Directed Verdict.

Defendant, Katalla Company, by its attorney, R. J. Boryer, moves the Court for a Directed Verdict for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defend-

ants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other [167] employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to make out a case against this defendant.

R. J. BORYER,

Attorney for Katalla Company.

[Endorsed:] Filed in the District Court, Territory of Alaska, Third Division. May 7, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy. [168]

Whereupon Mr. Boryer renewed his motion for a nonsuit on behalf of each of the defendants and also filed a separate motion on behalf of each of the defendants for a directed verdict, which motion in each case was by the Court overruled and defendant allowed an exception.

Counsel then addressed the jury, after which the Court delivered his instructions as follows:

Instructions of the Court.

GENTLEMEN OF THE JURY:

This is an action for damages alleged to have been suffered by the plaintiff, Heney, by reason of the negligence of the defendant corporations, in the manner set out in the complaint herein, to which you are referred for a more particular description of the same.

The defendant corporations deny the allegations of the complaint except that they admit they are duly incorporated. And each defendant corporation alleges that if any injury occurred to the plaintiff as alleged in the complaint, it was by reason—

1st. Of risks incident to his employment in which he was engaged and which risks the plaintiff assumed.

2nd. Of the negligence or contributory negligence of the plaintiff [169—133] and by reason of the negligence of a fellow-servant.

Therefore, under the issues and evidence in this case it becomes incumbent upon you as jurors to decide under these instructions and the facts as you find them the cause of the injury, if any, to the plaintiff, and whether one or both, or if either of the defendants are responsible for the same in whole

or in part, or at all.

I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions, which apply only to railroads as common carriers in Alaska and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier.

You are instructed that the rule of law is that between master and servant the master is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employee or servant.

In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not, he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant.

The master is not an insurer of the servant, but he is required to exercise such ordinary and reasonable care and precaution for the safety of his servants as the nature and dangers of the business admit of and demand. [170—134]

As between master and servant, negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases.

All acts and duties which the master is bound to perform toward his employees or servants, which he

delegates the performance of to others as an agent, then the agent occupies the same place as the master, and the master is deemed present and liable for the manner in which such duties are performed.

Negligence is not to be imputed to a master merely by reason of the fact that the place in which his servants are working is dangerous, or of a peculiarly dangerous character, but when an employee is required to render services in such a dangerous place, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duties.

So when a servant is employed in a tunnel, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of.

Where it is the duty of the workmen in a tunnel to shore up or crib or otherwise make safe the place of work as the work progresses, the master's duty is fulfilled when he furnishes them with suitable materials for the purpose and the above last-mentioned rule does not apply unless the master has some one in charge directing the work, and the employees are following the direct commands and directions of the master or his agent, in the due course of their duties as master. [171—135]

To hold a master liable for injuries alleged to have been suffered by or caused by the unsafe methods of work adopted by the master, it must be shown that he had or ought to have had knowledge of the danger.

To hold the master responsible for the method of work employed it must be shown that it was the

proximate cause of the injury.

ASSUMED RISKS.

You are instructed that the servant does not assume the extraordinary or unusual risks of the employment but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master's negligence.

CONTRIBUTORY NEGLIGENCE.

Where the negligence or want of ordinary care and caution of a servant so far contributes to his injury that it would not have occurred but for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent.

FELLOW-SERVANT, CONTRIBUTORY NEGLIGENCE OF.

All servants engaged in the same common work, without any dependence upon or relation to each other, except as colaborers [172—136] without rank, under the direction and management of the master or his agents, are fellow-servants.

A master is not responsible in damages for injuries to a servant caused by the negligence of a fellow-servant, engaged in the same general business,

where the master has furnished proper means for carrying on the work in which they are engaged.

To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master.

You are instructed that if you find from the evidence that the plaintiff was engaged in making the framework of the tunnel along with his coworkers and that he knew that the end of the tunnel where he fell had no guard-rail, then you are instructed that the plaintiff was bound to use such extraordinary care and caution as the known dangers of the place required.

You are instructed that if you find in this case that the plaintiff was working as a carpenter at the time of the injury and that he was familiar with and knew that the place where he fell over had no guard-rail, which fact was known a few days previously, and you further find he continued working there with knowledge of these facts, and if you further find that he knew or ought to have known, as a reasonably prudent man in his place, that it was dangerous so to do, with no guard-rail there, and you further find no one in authority had promised to erect one at the place, or other protection for this particular place, then you are instructed the plaintiff would assume the natural [173—137] and ordinary risks incident to the absence of the said guard-rails at the place and would be guilty of contributory negligence.

The Act of Congress mentioned in these instructions provides in part:

“That every common carrier engaged in commerce in the Territories * * * shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said Territories, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.”

“That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

You are instructed that a railroad common carrier in Alaska who as master employs a servant and the latter is injured while in such employment and the facts develop that both, that is, the master and servant, were negligent and such negligence caused the servant's injury, then the servant may still recover damages against the Railroad Company, but the damages should be in proportion to the negligence of the servant's contributing to his [174—138] injury, that is, the Railroad should answer in damages in proportion to the amount of negligence it contributed

to the cause of the injury to the employee or servant.

You are instructed that the plaintiff has sued both defendants, the Copper River & Northwestern Railway Company and the Katalla Company, and alleges that he was in the employment of both. Therefore you are instructed that before you can find that the plaintiff was in such employment you must find from the evidence that the relation of master and servant existed between the plaintiff and the defendant companies at the time of the injury.

You are also instructed that before you can find either of the defendants a common carrier under the statutory provisions of Congress referred to as the Acts of 1906 and 1908 you must be convinced by the evidence that one or both was offering or holding itself or themselves out to carry goods and passengers for the general public when offered and tendered them and the price for so doing.

In this case the burden of proving the issues alleged in the complaint and not admitted by the defendants devolves upon the plaintiff.

So the affirmative issues set up in the defendants' answers and denied by the plaintiff's reply must be proved by a preponderance of the evidence by the defendants or either of them, to entitle them to a verdict by reason of such defenses.

What we mean by a preponderance of the evidence is, that [175—139] preponderance refers to something that may and should be weighed. Of course you cannot get a pair of scales and weigh on one side the plaintiff's testimony, that of his witnesses, the presumptions, facts and circumstances in his favor

and that of the defendants on the other side of the scales, but you are to try to do so mentally so far as possible.

When the affirmative of an issue is sustained by the preponderance of the evidence, that means that the weight of the testimony on whose side the burden of proof rests has the greater weight and is therefore entitled to the verdict. While if the weight of the testimony is evenly balanced or preponderates in favor of the side on which the burden of the proof does not rest, then the verdict must be for the latter.

In determining the issues in this case you should take into consideration the whole of the evidence, and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to, and in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the result of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any appears, their appearance on the witness stand, the reasonableness of the story told and statements made by them and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

You cannot resort to conjecture and possibilities, but you must consider only those injuries, if any, that the plaintiff, by a preponderance of the evidence, has shown to exist. [176—140]

You are instructed the elements of damages to be considered in a suit for personal injuries when recoverable under the law and facts are the bodily

pain and suffering and mental anguish, if any, endured by him and resulting from the injuries, if any, received; the character and extent of the injuries as alleged in the complaint and sustained, if any, by the evidence, and whether they are permanent in their nature; the extent, if any, to which he has been prevented and disabled by reason of such injuries from working and earning a livelihood for himself in his station of life; his necessary expenses for medical attention, if any, in endeavoring to be cured.

These are what is known as compensatory damages.

This is your last case at this term of court, of which you have had several on the same general subject of personal injuries.

Give the evidence and the law your careful consideration and confine your deliberations thereto.

Three forms of verdict will be submitted. When you shall have unanimously agreed upon one, sign it by the hand of your foreman and return it into court. [177—141]

[Certificate of Official Stenographer to Transcript of Evidence.]

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such official stenographer I reported the proceedings in the trial of James Heney vs. Copper River & Northwestern Ry. Co. and Katalla Company; that the above is a full, true and correct transcript of the shorthand notes taken by me of the evidence given at said trial.

I. HAMBERGER,

Valdez, Alaska, May 31, 1913. [178]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Defendants.

Court's Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions and the same has been and is approved, allowed and settled and ordered filed and made a part of the record of said cause.

Done in open court this the 25 day of June A. D.
1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. Entered Court Journal No. 7, page No. 281. [179]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—May 8th—25 Court Day
—Thursday.

Entered Court Journal No. C.—2, Page No. 92.

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO., a Corporation, and KATALLA
CO., a Corp.,

Defendants.

Trial [Continued].

Now, on this day, the trial of the above-entitled cause came on again regularly for trial. Came the jury heretofore impaneled and sworn herein in charge of their sworn bailiffs and being called and each answering to his name present, by and thru their foreman in their presence in open court, their verdict, which is in words and figures as follows, to wit: [180]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN
RY. CO., a Corp., and THE KATALLA
COMPANY, a Corporation,

Defendants.

Verdict.

We, the jury duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendants, and each of them, and assess plaintiff's damages at \$2,125.00.

Dated at Cordova, Alaska, this 8th day of May, A. D. 1913.

KARL LONG,

Foreman.

[Endorsed]: Filed in the District Court, Territory, of Alaska, Third Division. May 8, 1913, Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. C.—2, page No. 92.
[181]

WHEREUPON said verdict is ordered filed and entered by the Clerk, and the jury is excused from further deliberation herein. [182]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Defendants.

Instructions [Requested by Defendant].

Comes now the Copper River and Northwestern Railway Company and the Katalla Company and requests the Court to make the following instructions in the above case :

I.

You are instructed that if you find from the evidence that the plaintiff was engaged in making the framework of the tunnel along with his coworkers, and that he knew that the end of the tunnel where he fell had no guard-rail, then you are instructed that the plaintiff was bound to use such extraordinary care and caution as the known dangers of the place required.

II.

You are instructed that the defendants, Copper River & Northwestern Railway Company and the Katalla Company, have plead separately in this action, and in order for you to find a verdict against either of the defendants, Copper River & Northwest-

ern Railway Company and the Katalla Company, you *much* first find from the evidence that the plaintiff was working for either the Katalla Company or the Copper River & Northwestern Railway Company or both, and if the evidence fails to show that the plaintiff was working for the Katalla Company, then you are instructed that the plaintiff cannot recover against the Katalla Company, and you are further [183] instructed that if the plaintiff fails to show from the evidence that he was working for the Copper River & Northwestern Railway Company, then you are instructed that he cannot recover against the Copper River & Northwestern Railway Company.

III.

You are instructed that if you find from the evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof of the tunnel or not move around, and he failed or refused to obey said orders, and he would not have been injured if he had obeyed said orders, and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action.

IV.

You are instructed that the burden is upon the plaintiff to establish his cause of action by a preponderance of evidence, and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendant was negligent but also that the defendant's negligence was the cause of the injury to the plaintiff, and if he fails to establish

these facts by the preponderance of the evidence the plaintiff cannot recover.

V.

You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks, and if he does not do this and is injured by reason of his failure to do so, then he cannot recover.

VI.

You are instructed that the law requires a person when doing a dangerous piece of work to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care he cannot recover. [184]

VII.

You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened, and that a reasonably prudent man under the circumstances would exercise due care to avoid danger, and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover.

VIII.

You are instructed that if the plaintiff continued working with knowledge, actual or constructive, of dangers which an ordinary prudent man would refuse or subject himself to, he is guilty of contributory negligence and cannot recover.

IX.

You are instructed that if the plaintiff failed to exercise ordinary and reasonable care, which care is such as an ordinary prudent man would exercise under similar circumstances, he is guilty of contributory negligence and cannot recover.

X.

You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations and that the plaintiff was in the employ of both Katalla Company and the Copper River & Northwestern Railway Company, therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway Company, you must find from the evidence that the relation of master and servant existed between the plaintiff and the Katalla Company and the Copper River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company, and if you find the relation of master and servant did not [185] exist between the Copper River & Northwestern Railway Company at the time the injury happened to plaintiff, then he cannot recover against the Copper River & Northwestern Railway Company.

XI.

You are instructed that if you find that the Katalla

Company was not doing a common carrier business at the time that the plaintiff was injured, and doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.

XII.

You are instructed that before you can find that the Copper River & Northwestern Railway Company was a common carrier at the place of the injury to the plaintiff, the plaintiff must prove that the Copper River & Northwestern Railway Company was offering or holding itself out to carry goods for all persons who tendered or offered goods and the price of carriage, and also find from the evidence that the Copper River & Northwestern Railway Company was carrying goods for all persons who offered or tendered them and the price of carrying them through the tunnel where the plaintiff was injured.

XIII.

You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident; therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not

to have a guard-rail at this place, and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the [186] risks incident to no guard-rail being at the point or place where he fell.

XIV.

You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury, and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident; therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew, or ought to have known as a reasonable prudent man, that it was dangerous not to have a guard-rail at this place and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point where he fell and cannot recover in this case.

XV.

You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident; therefore you are instructed that if the plaintiff continued working with knowledge of these

facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place, and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and is guilty of contributory negligence. [187]

XVI.

You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed, and while walking stepped off of the point or place where he claims there was no guard-rail, therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time.

XVII.

You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the

engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking, and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail, therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he is guilty of contributory negligence.

XVIII.

You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through [188] this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engines he voluntarily continued working when he knew that he could not see where he was walking, and that he did proceed and while walking stepped off of the point or place where he claims there was no guard rail, therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he cannot recover in this case.

XIX.

You are instructed that the plaintiff admitted that he was working while he claims the tunnel or place of work was not sufficiently lighted for several days. You are instructed that if the plaintiff knew this and

continued at work, that the plaintiff assumed the risks incident to his employment by reason of the fact that the tunnel was not sufficiently lighted.

XX.

You are instructed that the plaintiff admitted that his general work was that of assisting in re-timbering and strengthening the tunnel for the purpose of making same safe, you are therefore instructed that the plaintiff assumed all of the risks of his employment in his work of retimbering and strengthening said tunnel.

XXI.

You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers, and unless you so find the plaintiff cannot recover in this action.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 7, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [189]

*In the District Court of the Territory of Alaska,
Third Division.*

C.—No. 49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Defendants.

Motion for New Trial.

Comes now the defendants, Copper River & Northwestern Railway Company and Katalla Company, and moves the Court for a new trial in this action for the following reasons:

I.

That the damages allowed by the jury were excessive and were given under influence of passion and prejudice.

II.

That there was insufficiency of evidence to justify the verdict and that the same is against the law.

III.

Error in law occurring at the trial and excepted to by the party making the application.

IV.

For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers, that there was no evidence introduced in

this case sufficient for the jury to find that both the Copper River & Northwestern Railway Company and the Katalla Company were each or both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway and the Katalla Company, and that the evidence failed to show that either of said defendants were connected in any way with each other in doing a common carrier or other business. [190]

V.

For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers; that the two remedies are separate and distinct, and that the plaintiff suing under the aforesaid Acts cannot recover under the common-law liability.

VI.

For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard-rail on it, and knew the exact position and condition of the point or place where he claims he was injured and by which *he injured*; that the evidence further showed that he with three other coworkers working with him, no foreman being present, were performing work on the scaffold or platform, and that the plaintiff himself had at prior times, when trains were

passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this particular day and time this plaintiff, knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured for the purpose of putting down some braces; that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor; that all of the other men working with him admitted that they stood still at this time, they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted to walk through the smoke and walked off the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time and for several days prior thereto, and admits that there [191] was sufficient lumber convenient which he could have used to put on a guard-rail.

R. J. BORYER,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.
[191“A”]

198 *Copper River & Northwestern Ry. Co. et al.*

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—May 10th—26th Court
Day—Saturday.

Entered Court Journal No. C.—2, Page No. 100.
C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corp., and THE KA-
TALLA COMPANY, a Corp.,

Defendants.

**Order Denying Motion for New Trial, Granting
Exception and Fixing Time to File and Present
Bill of Exceptions.**

Now, on this day, this matter came on regularly to be heard upon the motion for a new trial filed by the defendants herein, E. E. Ritchie appearing as attorney for the plaintiff, R. J. Boryer appearing as attorney for defendants, and after arguments had and the Court being fully advised in the premises,

IT IS ORDERED that said motion for a new trial filed by the defendant herein be and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is duly allowed; and

IT IS FURTHER ORDERED that defendants have 60 days from date hereof to file and present their bill of exceptions and that execution be stayed for said period. [192]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Defendants.

**Defendants' Exceptions to the Court's Instructions
to Jury.**

I.

Defendants except to Instruction 1 given by the Court on page 2, which is as follows: "I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions which apply only to railroads as common carriers in Alaska, and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier," for the reason that in this instruction the Court states that he is instructing first under the statutory law regarding common carriers and, secondly, under the common law regarding carriers.

II.

Defendant excepts to instruction 2 on page 2, which is as follows: "You are instructed that the rule of law is that between master and servant the

master is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employee or servant," for the reason that said instruction is contrary to the law and confusing as to whether said instruction was meant to apply to liability of common carriers under the statutory law or common law. [193]

III.

Defendant excepts to the third instruction on page 2, which is as follows: "In other words, the master is bound to use reasonable care and diligence to prevent accident or injury and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant," for the reason that the same is contrary to law and the issues raised in this case.

IV.

Defendant excepts to fourth instruction given on page 2, which is as follows: "As between master and servant negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases," for the reason that the same is contrary to law and is not applicable to the issues in the pleadings.

V.

Defendant excepts to the first instruction on page 3, which is as follows: "All acts and duties which the master is bound to perform toward his employees or

servants, which he delegates the performance of to others as an agent, then the agent occupies the same place as the master and the master is deemed present and liable for the manner in which such duties are performed," for the reason that said instruction and none of the instructions advise the jury what acts and duties the master is bound to perform towards his employees or servants.

VI.

Defendants except to third instruction on page 3, which is as follows: "So when a servant is employed in a tunnel the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of," for the reason that said instruction is contrary to law and the issues made up in this case, and for the further reason that it may have been the duty of the servants working in the tunnel to have made the place safe. [194]

VII.

Defendants except to third instruction on page 4, which is as follows: "You are instructed that the servant does not assume the extraordinary or unusual risks of the employment, but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master's negligence," for the reason that same is contrary to law, and for the further reason that the servant does assume the extraordin-

ary and unusual risks of the employment if such risks and perils are incident to the work and are known or should be known to the plaintiff.

VIII.

Defendant excepts to the 4th instruction on page 4, which is as follows: "Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent," for the reason that it is contrary to law, and for the further reason that it does not instruct the jury as to what is contributory negligence, and requires the master and his agents to exercise ordinary and reasonable care to prevent the consequences of the servant's negligence.

IX.

Defendant excepts to instruction five on page 4, which is as follows: "All servants engaged in the same common work, without any dependence upon or relation to each other, except as colaborers without rank, under the direction and management of the master or his agents are fellow-servants," for the reason that said instruction is contrary to law and is not the proper rule to determine who are fellow-servants and for the further reason that said instruction [195] is given on the assumption that if the

plaintiff cannot recover under the Employers' Liability Acts then he might recover under the common law.

X.

Defendant excepts to second instruction on page 5, which is as follows: "To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master," for the reason that said instruction is erroneous and contrary to law, and that said instruction is given for the purpose of permitting recovery under the common law when this action is based upon the Employers' Liability Acts.

XI.

Defendant excepts to instruction two on page 6, which is as follows: "That every common carrier engaged in commerce in the Territory * * * shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said Territories, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover

damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," for the reason that it was not shown in the evidence that the plaintiff was working on any of the cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment, as plaintiff was working on a tunnel and for the further reason that [196] the pleadings do not allege that either of the defendants was a common carrier.

XII.

Defendant excepts to instruction given on page 9, which is as follows: "This is your last case at this term of court, of which you have had several on the same general subject of personal injuries," for the reason that said instruction impliedly told the jury that they should consider other instructions that they had received in other cases and it is not shown that any other case was similar to this case.

XIII.

Defendants except to the refusal of the Court to give the second instruction requested by the defendants.

XIV.

Defendants except to the refusal of the Court to give the third instruction requested by the defendants.

XV.

Defendants except to the refusal of the Court to give the fourth instruction requested by the defendants.

XVI.

Defendants except to the refusal of the Court to give the sixth instruction requested by the defendants.

XVII.

Defendants except to the refusal of the Court to give the eighth instruction requested by the defendants.

XVIII.

Defendants except to the refusal of the Court to give the eleventh instruction requested by the defendants.

XIX.

Defendants except to the refusal of the Court to give the thirteenth instruction requested by the defendants. [197]

XX.

Defendants except to the refusal of the Court to give the fourteenth instruction requested by the defendants.

XXI.

Defendants except to the refusal of the Court to give the sixteenth instruction requested by the defendants.

XXII.

Defendants except to the refusal of the Court to give the seventeenth instruction requested by the defendants.

XXIII.

Defendants except to the refusal of the Court to give the eighteenth instruction requested by the defendants.

XXIV.

Defendants except to the refusal of the Court to give the nineteenth instruction requested by the defendants.

XXV.

Defendants except to the refusal of the Court to give the twentieth instruction requested by the defendants.

XXVI.

Defendants except to the refusal of the Court to give the twenty-first instruction which is as follows: "You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers and unless you so find, the plaintiff cannot recover in this action."

Exceptions allowed.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

[198]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Judgment.

This cause came on for trial on the 6th day of May, 1913, in the above-named court at the special Cordova term called for April, 1913, the plaintiff appearing in person and by his counsel, E. E. Ritchie, and the defendants appearing by their counsel, R. J. Boryer. A jury of twelve men was duly selected, impaneled and sworn to try the cause. The parties introduced their evidence and rested, and after argument by counsel and instructions by the Court the jury retired to deliberate upon their verdict on the 7th day of May, 1913.

Thereafter, upon the 8th day of May, 1913, the jury returned into court with their verdict, whereby they found for the plaintiff and against the defendants, and each of them, and assessed the plaintiff's damages recoverable from the defendants at \$2,125.

On the 10th day of May, 1913, the defendants filed a motion for a new trial of said cause, which motion was on the same day argued by counsel for defendants and was by the Court denied, to which order of

the Court denying said motion defendants by their counsel then and there excepted and said exception was by the Court allowed.

Wherefore, by reason of the law and the premises hereinbefore recited, IT IS ORDERED AND ADJUDGED by the Court here that the said plaintiff do have and recover from the defendants, [199] and each of them, the sum of \$2,125 and the costs of this action, taxed at \$78.10.

Done at Cordova, Alaska, this 10th day of May, 1913.

PETER D. OVERFIELD,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. C.-2, page No. 101.
[200]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Order Allowing, Certifying and Settling Bill of Exceptions.

It appearing to the Court that the defendant has prepared and duly served upon attorney for the plaintiff within due time a proposed Bill of Exceptions, and said proposed Bill of Exceptions having been delivered to the Clerk of the above-entitled Court for the Judge thereof, and the Clerk having delivered said proposed Bill of Exceptions to said Judge, and said Judge of said Court having duly designated the 25th day of June, A. D. 1913, as the time at which he would settle the Bill of Exceptions, and both plaintiff's and defendant's attorneys having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 25th day of June, A. D. 1913, and the attorneys for both plaintiff and defendant being present,

IT IS THEREUPON AND IS HEREBY ORDERED that the proposed Bill of Exceptions be allowed and the same shall be and is hereby settled and allowed as a Bill of Exceptions herein, and the same shall be presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form,— [201]—

IT IS THEREFORE ORDERED that the said Bill is a true Bill of Exceptions, and the same is hereby approved, allowed and settled and ordered filed and made a part of the record of this cause.

Done in open court this the 25th day of June, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. Entered Court Journal No. 7, page No. 280. [202]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Stipulation [Waiving Service of Papers].

WHEREAS, E. E. Ritchie, attorney for the plaintiff in the above-entitled action, is contemplating a trip to the States, to be gone possibly thirty (30) days:

NOW, THEREFORE, it is hereby stipulated by and between the plaintiff's attorney for and on behalf of the plaintiff and the attorney for the defendant, that the service of all papers in the above-entitled action in the appeal or any other steps taken in said case be waived by the attorney for the plaintiff, and that same may be filed in the office of the

Clerk of Court and be of the same effect as if served upon the plaintiff or his attorney.

Dated this the 10th day of May, A. D. 1913.

E. E. RITCHIE,
Attorney for Plaintiff,
R. J. BORYER,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 16, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [203]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,

Defendants.

Assignment of Errors.

Comes now the defendants in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

The Court erred in permitting witness James Heney to testify relative to light in tunnel at time not connected with accident; and overruling defend-

ant's exception to introduction of said testimony, same being duly excepted to and exception allowed, which testimony was as follows:—

Q. (Mr. RITCHIE.) “During that time when you were working in the tunnel, how was the place lighted?”

A. “Sometimes it was lighted up pretty good.”

Q. “How was it lighted in the first place, describe the light?”

Mr. BORYER.—“We object to the introduction of any testimony except as to the light at the time of the injury.”

Mr. RITCHIE.—“It goes to the company's negligence.”

Objection overruled. Defendant allowed an exception.

A. “We had carbide lights there—it threw very good lights, we could see all around the tunnel; in fact we had two of them part of the time and we had a couple of gasoline torches.”

Q. “Those carbide lights, what power were they, if you know?” [204]

A. “I couldn't tell the power of them, but they threw a good light.”

Q. “How far would they throw light?”

A. “Two or three hundred feet.”

Q. “Would they light the tunnel?”

A. “They would light the tunnel.”

Q. “Describe them and how they were placed.”

A. “These carbide lights, they stood in a tank

about that high (indicating)—you put the carbide into a little tank and this tank is full of water and there is a box in it and you put a light over it and put a match to it and it forms gas and lets the light through.”

Q. “That threw a very clear light?”

A. “That threw a very clear light.”

Q. “When these were in use in the tunnel how would the light in the tunnel compare with the ordinary well-lighted city street?”

A. “Yes, it was as good a light as you see in a city street.”

Q. “Did they take those lights away?”

A. “Yes, they took one of them away and they took the carbide they had for the other one down to the wreck with them.”

Q. “That was in what month?”

A. “In the month of January, 1912.”

Q. “They took them down to bridge 75A?”

A. “Where that rotary was hurt, yes.”

Q. “After they ceased to have the carbide lights, how did they light the tunnel?”

A. “We had some gasoline torches there.”

Q. “Describe them.”

A. “It was a lamp you hang up on a post and there was a lot of holes in it; when you put a match to it it threw the light out, may be five or six lights would spread out through the torch.”

[205]

Q. “How much light did they throw?”

A. “Quite a bit but not as much as the other.”

Q. "Did they make the tunnel comparatively light?"

A. "Not all over the tunnel, no."

Q. "How far could you see from these lights and see quite distinctly?"

A. "Twenty or twenty-five feet probably."

Q. "How long before you had this accident was it that they took those lights away?"

A. "I couldn't say exactly—I think they were gone four or five days."

Q. "After that what lights did you have?"

A. "We used the gasoline torches and we ran out of gasoline and then we had only lanterns, three lanterns."

Q. "What kind of lanterns were those?"

A. "Small little ordinary lanterns that you pack around when you are going out at night."

Q. "Such as an individual carries with him to go home by?"

A. "Yes, sir."

Q. "You had been working solely by those lights for several days?"

A. "By lanterns?"

Q. "Yes."

A. "Yes, we had been working two or three days that I know of."

II.

The Court erred in permitting witness W. H. Slimpet to testify relative to lantern or torch being placed in hole or shaft, and overruling defendant's exception to introduction of said testimony, same being duly excepted to and exception allowed which

testimony was as follows:

Q. (Mr. RITCHIE.) "If there had been a lantern placed low there, a lantern or a torch, in a sort of narrow hole or shaft right on the side of that big hole, could a man have seen it through that smoke, if he was approaching the hole?"

Mr. BORYER.—"We object to that as incompetent, irrelevant and immaterial."

Objection overruled. Defendant allowed an exception. [206]

A. "If the light was one side of the tunnel and you were on the other, you couldn't have seen it—the smoke was too dense."

Q. "If the light had been directly in front of you as you approached it?"

A. "Yes, you could have seen if there was a light there."

III.

The Court erred in making the following statement after the following questions asked of Slimpert:

A. (The WITNESS.) "Mr. Forrester told us, when Mr. Kilsen was there and was complaining of the smoke one day, Mr. Forrester said—if it gets too thick with smoke, to sit down and quit working or go downstairs."

Q. (Mr. BORYER.) "He told you to quit working?"

A. "Yes, he told us to quit working or go down—who wanted to stay up there, to stay up there and who wanted to go down, to go down."

By the COURT.—“Was Mr. Heney there at that time?”

Mr. RITCHIE.—“We move to strike it out.”

By the COURT.—“It may stand; of course it wouldn't be binding on Heney unless the jury find that Heney received such instructions.”

IV.

The Court erred in permitting plaintiff to read and introduce in evidence printed heading of waybill against defendant's objection which was overruled and exception taken and allowed, testimony of which is as follows:

Q. (Mr. RITCHIE.) “You have seen the waybills that they used, have you not?”

A. “Yes, sir.”

Q. “I will ask you whether those are the ones that were used. (Handing witness paper.) That is the form they used?”

A. “That is the form of the waybill that they used to the best of my knowledge, yes, sir— I wouldn't be positive about it.”

Mr. RITCHIE.—“This is an exhibit in another case and I would like to read the printed heading of this into the record.” [207]

Mr. BORYER.—“We object to it for the reason that this bill of lading is under date of March, 1911, and for the reason that it is possible that either the Katalla Company or the Copper River & Northwestern Railway Company may have been doing business in March, 1911, at the time this bill of lading is dated and may have gone out of business before the date

of this accident.”

Objection overruled. Defendant allowed an exception.

Mr. RITCHIE.—“I will read the printed heading of this—Katalla Company. (Constructing and operating Copper River & Northwestern Railway Co.) Straight bill of lading—Original. On the usual printed form.”

V.

The Court erred in permitting plaintiff to introduce in evidence by Lattin the following questions and in *referring* to strike same to which objection was made, same being overruled and exception taken and allowed:

Q. (Mr. RITCHIE.) “How did the way-bills read up to a few months ago for freight, that is, the heading? I will ask you if that is the present form. (Handing witness paper.)”

A. “This is the bill of lading.”

Q. “Is that the present form in use?”

A. “We are using that at present.”

Q. “And prior to the time you began using that, did you have a form with the Katalla Company at the head of it?”

A. “Yes, sir.”

Q. “It read, The Katalla Company, Constructing and Operating the Copper River & Northwestern Railway Company?”

A. “Yes, sir.”

Mr. BORYER.—“We move to strike the answer and I want an exception, for the reason that the bill of lading says: Katalla Company

operating and constructing the Copper River & Northwestern Railway Company; the fact that the Katalla Company was constructing does not show that there was any relation between the Katalla Company and the Copper River & Northwestern Railway Company, because the Katalla Company might have been an independent contractor.”

Objection overruled and motion to strike denied.

Defendant allowed an exception. [208]

VI.

The Court erred in permitting plaintiff to read into record statements of Katalla Company filed with Clerk of Court as yearly statements, to which defendant excepted and exceptions were allowed, which statements were as follows:

Q. (Mr. RITCHIE.) “Is the clerk of the court for the Third Division the custodian of all the papers filed by foreign corporations doing business in this division.”

A. “Yes, sir.”

Q. “Among those corporations is the Katalla Company one?”

A. “Yes, sir.”

Q. “State what those papers are. (Handing witness papers.)”

A. “They seem to be numerous corporation papers of the Katalla Company, among which are original articles and yearly statements.”

Q. “Have you the articles there—a copy of the articles filed?”

A. “It is called certificate of incorporation; I

“presume that is the one.”

Q. “Get out the statements for 1911 and 1912.”

Mr. RITCHIE.—“Mr. Boryer, will you admit that the Katalla Company was incorporated for the purpose of constructing, incorporated under the laws of New York and doing business in Alaska as a construction company and for the constructing of railroad and—”

Mr. BORYER.—“I admit that it was a construction company, organized for the purpose of constructing railroads.”

Q. (Mr. RITCHIE.) “Have you found the statements for 1911 and 1912?”

A. “Yes, sir, here they are.”

Mr. RITCHIE.—“I want to read into the record part of that paragraph (handing to Mr. Boryer). We plead that the Katalla Company is the agent of the Copper River & Northwestern Railway Company, doing certain work for it of which the public is not fully informed—I want to read what the company says about its own assets.”

Mr. BORYER.—“I have no objection to that.”

Mr. RITCHIE.—“This is the statement for 1911. The fifth paragraph recites that the assets of said corporation consist of contract for building a railroad in Alaska, material on hand and claim against R. R. Company for work already performed, which under the terms of contract is not yet payable. The fifth paragraph

in the statement for 1912 [209] reads—The assets of said corporation consist of contract for building a railroad in Alaska, material on hand and claim against Railroad Company for work already performed, which under terms of contract is not yet payable.”

MR. BORYER.—“We object to the introduction for the reason that the statements as read from the papers do not show that these assets were assets of the Copper River & Northwestern Railway Company, and do not designate or say what assets it is or what railroad.”

MR. RITCHIE.—“I think we will connect it up by other testimony.”

By the COURT.—“It may be admitted.”

To which ruling of the Court counsel for defendant is allowed an exception.

VII.

The Court erred in overruling defendant’s Motion to Quash Service on Katalla Company, to which ruling defendant duly excepted and exception was allowed.

VIII.

The Court erred in overruling defendant’s motion to make More Definite and Certain and Motion to Strike, to which ruling defendant excepted and exception was allowed.

IX.

The Court erred in denying the Motion of the plaintiff in error made after the defendant in error rested his case, for a nonsuit of said action, which motion was as follows as to both defendants:

I.

“That this action is based on the Act of 1908, commonly known as the Employers’ Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business for the reason that the aforesaid Act takes away the common law liability and that they are separate and distinct laws which cannot be joined.”

II.

“That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.”
[210]

III.

“That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman.”

IV.

“For the further reason that the plaintiff has

failed to make out a case against these defendants.”

X.

The Court erred in denying the motion of the plaintiff in error made at the close of the case for a Directed Verdict on behalf of both defendants, to which defendants excepted and exception was allowed, which Motion was same as to both defendants and was as follows:

I.

“That this action is based on the Act of 1908, commonly known as the Employers’ Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.”

II.

“That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.”

III.

“That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the

tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman."

IV.

"For the further reason that the plaintiff has failed to make out a case against this defendant." [211]

XI.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed:

"I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions which apply only to railroads as common carriers in Alaska, and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier."

XII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exceptions allowed:

"You are instructed that the rule of law is that between master and servant the master is liable for all accidents occurring in the course of the employment which are not induced by the care-

lessness or improper conduct of the employee or servant.”

XIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“In other words, the master is bound to use reasonable care and diligence to prevent accident or injury and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant.”

XIV.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“As between master and servant negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases.”

XV.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“All acts and duties which the master is bound to perform toward his employees and servants, which he delegated the performance of to others as an agent, then the agent occupies the same place as the master and the master is

deemed present and liable for the manner in which such duties are performed.”

XVI.

The Court erred in giving the following instruction, to which [212] plaintiffs in error duly excepted and its exception allowed:

“So when a servant is employed in a tunnel the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of.”

XVII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“You are instructed that the servant does not assume the extraordinary or unusual risks of the employment but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew of or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master’s negligence.”

XVIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but

for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent."

XIX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"All servants engaged in the same common work, without any dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master, or his agents, are fellow-servants."

XX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master."

XXI.

The Court erred in giving the following instruction, to which [213] plaintiffs in error duly excepted and its exception allowed:

“That every common carrier engaged in commerce in the Territories * * * shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said territories, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.”

“That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

XXII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“This is your last case at this term of court, of which you have had several on the same general subject of personal injured.”

XXIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the defendants, Copper River & Northwestern Railway Company and the Katalla Company have plead separately in this action and in order for you to find a verdict against either of the defendants, Copper River & Northwestern Railway Company and the Katalla Company, you must first find from the evidence that the plaintiff was working for either the Katalla Company or the Copper River & Northwestern Railway Company or both and if the evidence fails to show that the plaintiff was working for the Katalla Company, then you are instructed that the plaintiff cannot recover against the Katalla Company and you are further instructed that if the plaintiff fails to show from the evidence that he was working for the Copper River & Northwestern Railway Company, then you are instructed that he cannot recover against the Copper River & Northwestern Railway Company.”

XXIV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that if you find from the evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof [214] of the tunnel or not move around and he failed or refused to obey said orders and he would not have been injured if he

had obeyed said orders and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action."

XXV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the burden is upon the plaintiff to establish his cause of action by a preponderance of evidence and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendants were negligent but also that the defendants' negligence was the cause of the injury to the plaintiff and if he fails to establish these facts by the preponderance of the evidence the plaintiff cannot recover."

XXVI.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks and if he does not do this and is injured by reason of his failure to do so, then he cannot recover."

XXVII.

The Court erred in refusing to give to jury the fol-

lowing instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man would refuse or subject himself to, he is guilty of contributory negligence and cannot recover.”

XXVIII.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.” [215]

XXIX.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which

fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell."

XXX.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

"You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place and no one in authority had promised to

have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and cannot recover in this case.”

XXXI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time.” [216]

XXXII.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff has ad-

mitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel, and that smoke from the engines surrounded the place where he was working and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he is guilty of contributory negligence."

XXXIII.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working and that while he was surrounded by smoke from the engines he voluntarily continued working when he knew that he could not see where he was walking and

that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he cannot recover in this case.”

XXXIV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff admitted that he was working while he claims the tunnel or place of work was not sufficiently lighted for several days. You are instructed that if the [217] plaintiff knew this and continued at work, that the plaintiff assumed the risks incident to his employment by reason of the fact that the tunnel was not sufficiently lighted.”

XXXV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff admitted that his general work was that of assisting in retimbering and strengthening the tunnel for the purpose of making same safe. You are therefore instructed that the plaintiff assumed all of the risks of his employment in his work of retimbering and strengthening said tunnel.”

XXXVI.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers and unless you so find, the plaintiff cannot recover in this action.”

The Court erred in denying the motion of defendants (plaintiffs in error) for a new trial herein, and its order and judgment overruling said motion and granting judgment in favor of plaintiff and against said defendants for the amount of the verdict found by the jury in favor of plaintiff with costs; which order and judgment were duly excepted to by the defendants and exception allowed by the Court. Said motion was based on all the files, records and proceedings herein and was made upon the following grounds specified therein and on each thereof, to wit:

Comes now the defendant, Copper River & Northwestern Railway Company and Katalla Company, and moves the Court for a New Trial in this action for the following reasons:

I.

“That the damages allowed by the jury were excessive and were given under influence of passion and prejudice.”

II.

“That there was insufficiency of evidence to justify the [218] Verdict and that the same is against the law.”

III.

“Error in law occurring at the trial and excepted to by the party making the application.”

IV.

“For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers’ Liability Act regarding common carriers, that there was no evidence introduced in this case sufficient for the jury to find that both the Copper River & Northwestern Railway Company and the Katalla Company were each of both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway Company and the Katalla Company, and that the evidence failed to show that either of said defendants were connected in any way with each other in doing a common carrier or other business.”

V.

“For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers’ Liability Act, regarding common carriers; that the two remedies are separate and distinct and that the plaintiff suing under the aforesaid Acts cannot recover under the common law liability.”

VI.

“For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard-rail on it and knew the exact position and condition of the point or place where he claims he was injured and by which he was injured; that the evidence further showed that he with three other coworkers working with him, no foreman being present, were performing work on the scaffold or platform and that the plaintiff himself had at prior times, when trains were passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this particular day and time this plaintiff knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured, for the purpose of putting down some braces; that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor, that all of the other men working with him admitted that they stood still at this time; they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted [219] to walk through the smoke and walked off

the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time and for several days prior thereto and admits that there was sufficient lumber convenient which he could have used to put on a guard-rail."

[Signed] "R. J. BORYER,
Attorneys for Defendants."

WHEREFORE, the defendants, plaintiffs in error, pray that said judgment may be reserved, vacated and set aside, and that the verdict found by the jury at the close of the trial herein on which judgment was based may be vacated and set aside, and that said action be ordered dismissed, and for such other and further relief, or both, in the premises, as may be proper.

R. J. BORYER,
Attorney for Copper River & Northwestern Railway
Company, Plaintiff in Error.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Katalla Company, Plaintiff in
Error.

[Endorsed]: Filed in the District Court for the
Territory of Alaska, Third Division. June 25th,
1913. Angus McBride, Clerk. By Thos. S. Scott,
Deputy. [220]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KAT-
ALLA COMPANY, a Corporation,

Defendants.

Petition for Writ of Error.

Comes now the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, the defendants herein, and complains and stated that on the 10th day of May, A. D. 1913, the above-entitled court entered judgment herein in favor of the plaintiff above named, and against the defendants above named, in which judgment, and in the proceedings had prior thereto, in the above-entitled cause, certain errors were committed to the prejudice of these defendants, all of which will appear in the detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of

Appeals for the Ninth Circuit.

And defendants further pray for an order fixing the amount of bond for a supersedeas in said cause.

Dated this, the 25th day of June, A. D. 1913.

R. J. BORYER,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [221]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KAT-
ALLA COMPANY, a Corporation,

Defendants.

Order Allowing Writ of Error.

On this day came the defendants, the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, by their attorney, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and an assignment of errors to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that

the amount of bond for supersedeas in said cause be fixed. On consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

IT IS FURTHER ORDERED that a bond in the sum of Three Thousand (\$3,000.00) Dollars, conditioned according to law, be executed in behalf of the above named defendants, with good and sufficient surety, to be approved by the undersigned Judge, and that upon said bond being executed, approved and filed, said judgment in this cause shall forthwith be superseded, and all proceedings in this cause stayed until a final determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this the 25th day of June, A. D. 1913.

FRED M. BROWN,

Judge for the District Court for the Territory of
Alaska, Third Division. [222]

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25th, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 282. [223]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KAT-
ALLA COMPANY, a Corporation,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Katalla Company, a corporation, and the Copper River & Northwestern Railway Company, a corporation, defendants in the above-entitled cause of action, as principals, and S. Blum and ———, as sureties, are held and firmly bound unto James Heney, plaintiff above named, in the sum of Three Thousand (\$3,000.00) Dollars lawful money of the United States, to be paid to the said plaintiff, his heirs, executors, administrators and assigns, for which payment, well and truly to be made, we do hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Valdez, this the 25 day of June, A. D. 1913.

WHEREAS, lately, at a District Court of the Territory of Alaska, Third Division, in a suit pending in said Court, between James Heney, plaintiff, and

Copper River and Northwestern Railway Company and Katalla Company, corporations, a judgment was rendered in favor of said plaintiff and against said defendants in the sum of Two Thousand One Hundred and Twenty-five (\$2,125.00) Dollars and costs, and the said Copper River & Northwestern River Railway [224] Company and the Katalla Company, defendants, having obtained a Writ of Error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment in the aforesaid action, and having obtained a citation directed to the above-named plaintiff, citing and admonishing him to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit.

Now, therefore, the condition of the above obligation is such, that if the Copper River & Northwestern Railway Company and the Katalla Company shall prosecute its Writ of Error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

It is hereby expressly agreed by said sureties that in case of a breach of any condition hereof, the above-named District Court of the United States for the Territory of Alaska, Third Division, may, upon notice to said sureties of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which said sureties are bound to

pay on account of such breach, and render judgment therefor against said sureties, and award execution therefor.

COPPER RIVER & NORTHWESTERN
RAILWAY CO.

By R. J. BORYER,
Attorney.

KATALLA COMPANY,

By R. J. BORYER,
Attorney. [225]
S. BLUM,
Surety.

,
Surety.

The foregoing bond is hereby approved as a bond on a Writ of Error and Supersedeas Bond, this the 25 day of June, A. D. 1913.

FRED M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

I approve the above bond.

E. E. RITCHIE,
Attorney for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.
[226]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KAT-
ALLA COMPANY, a Corporation,
Defendants.

Writ of Error [Original].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third Divi-
sion, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between James Heney, the original plaintiff,
and the defendant in error, and the Copper River &
Northwestern Railway Company, and the Katalla
Company, the original defendants and the plaintiffs
in error, manifest error hath happened to the
damage of said Copper River & Northwestern
Railway Company, and Katalla Company, plain-
tiffs in error, as by their answer, appear, we be-
ing willing that error, if any hath been, should
be duly corrected and full and speedy justice done to
the parties aforesaid, in this behalf, do command you,
if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 25th day of July, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said [227] Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 25th day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] ANGUS McBRIDE,
Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 301. [228]

Due and legal service is hereby accepted this the 25th day of June, A. D. 1913, by receiving a true and correct copy of Writ of Error in this case.

E. E. RITCHIE,
Attorney for Plaintiff and Defendant in Error.

[229]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Writ of Error [Copy].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third Di-
vision, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between James Heney, the original plaintiff,
and the defendant in error, and the Copper River
& Northwestern Railway Company and the Katalla
Company, the original defendants and the plaintiffs
in error, manifest error hath happened to the dam-
age of said Copper River & Northwestern Railway
Company, and Katalla Company, plaintiffs in error,
as by their answer appear, we being willing that error,
if any hath been, should be duly corrected and full and
speedy justice done to the parties aforesaid in this
behalf, do command you, if judgment be therein
given, that then, under your seal, distinctly and

openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 25th day of July, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said [229a] Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 25th day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] ANGUS McBRIDE,
Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by: FRED M. BROWN,
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Due and legal service is hereby accepted this 25th day of June, A. D. 1913, by receiving a true and correct copy of Writ of Error in this case.

E. E. RITCHIE,
Attorney for Plaintiff and Defendant in Error.
[229b]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, the Katalla Company, a Corporation, and
the Copper River & Northwestern Railway Com-
pany, a corporation, defendants in the above-entitled
cause of action, as principals, and S. Blum and
———, as sureties, are held and firmly bound
unto James Heney, plaintiff above named, in the
sum of Three Thousand (\$3,000.00) Dollars, lawful
money of the United States, to be paid to the said
plaintiff, his heirs, executors, administrators and as-
signs, for which payment, well and truly to be made,
we do hereby bind ourselves, our and each of our
successors and assigns, jointly and severally, firmly
by these presents.

Sealed with our seals and dated at Valdez, this
the 25th day of June, A. D. 1913.

WHEREAS, lately, at a District Court of the Ter-
ritory of Alaska, Third Division, in a suit pending
in said court, between James Heney, plaintiff and

the Copper River & Northwestern Railway Company and Katalla Company, corporations, a judgment was rendered in favor of said plaintiff and against said defendants in the sum of Two Thousand One Hundred and Twenty-five (\$2,125.00) Dollars and costs, and the said Copper River & Northwestern River Railway Company and the Katalla Company, defendants, having obtained a Writ of Error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment in the aforesaid action, and having obtained a [230] Citation directed to the above named plaintiff, citing and admonishing him to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit.

Now, therefore, the condition of the above obligation is such, that if the Copper River & Northwestern Railway Company and the Katalla Company shall prosecute its Writ of Error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

IT IS HEREBY expressly agreed by said sureties that in case of a breach of any condition hereof, the above named District Court of the United States for the Territory of Alaska, Third Division, may, upon notice to said sureties of not less than ten days, proceed summarily in the above-entitled action to

ascertain the amount which said sureties are bound to pay on account of such breach, and render judgment therefor, against said sureties, and award execution therefor.

COPPER RIVER & NORTHWESTERN
RAILWAY CO.

By R. J. BORYER,
Its Attorney.

KATALLA COMPANY,
By R. J. BORYER,
Its Attorney.
S. BLUM,
Surety.

The foregoing bond is hereby approved as a bond on a Writ of Error and Supersedeas Bond, this the 25th day of June, A. D. 1913.

FRED M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

I approve the above Bond.

E. E. RITCHIE,
Attorney for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [231]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Citation on Writ of Error [Original].

United States of America.

The President of the United States to James Heney,
Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company and Katalla Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment is said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 25th day of June, in the

year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] FRED M. BROWN,
Judge in the District Court for the Territory and
District of Alaska, Third Division.

Entered Court Journal No. 7, page No. 302. [232]

Copy of this Citation received and service acknowledged this the 25th day of June, A. D. 1913.

E. E. RITCHIE,
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court for the
Territory of Alaska, Third Division. June 25th,
1913. Angus McBride, Clerk. By Thos. S. Scott.
Deputy. [233]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Citation [on Writ of Error (Copy)].

United States of America.

The President of the United States to James Heney,
Greeting:

You are cited and admonished to be and appear
in the United States Circuit Court of Appeals for

the Ninth Circuit at the courtroom of said Court in the city of San Francisco, in the State of California, within 30 days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company and Katalla Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment *is* said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 25th day of June, in the year our Lord, One Thousand Nine Hundred and Thirteen.

[Seal] FRED M. BROWN,
Judge in the District Court for the Territory and
District of Alaska, Third Division. [233a]

Copy of this Citation received and service acknowledged this the 25th day of June, A. D. 1913.

E. E. RITCHIE,
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [233b]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

**Acknowledgment of Service of Papers on Writ of
Error.**

Service of the Petition of Writ of Error, of the Assignment of Errors, of the Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above-entitled cause, filed in the above-entitled court on the 25th day of June, A. D. 1913, is hereby acknowledged and receipt of true copies thereof on this the 25th day of June, A. D. 1913, is also acknowledged.

R. J. BORYER,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

[234]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, certify and transmit forthwith to the United States Circuit Court of Appeal for the Ninth Judicial Circuit, at San Francisco, California, as the record on writ of error to the District Court for the Territory of Alaska, Third Division, a complete transcript of the following files, record and proceedings in the above-entitled cause, to wit:

Complaint.

Marshal's Return.

Motion to Quash Service.

Order on Motion to Quash Service, and Minute Order
Allowing Amendment and Exception Thereto.

Motion to Amend Complaint by Interlineation.

Order Allowing Same and Exception.

Answer of Katalla Company and Copper River &
Northwestern Railway Company.

Reply to Answer of Katalla Company and Copper
River & Northwestern Railway Company.

Motion for Nonsuit by Katalla Company and Copper
River & Northwestern Railway Company.
[235]

Order on Motion for Nonsuit by Katalla Company
and Copper River & Northwestern Railway
Company, and exception to same.

Motion for Directed Verdict by Katalla Company
and Copper River & Northwestern Railway
Company.

Defendant's Requested Instructions.

Verdict.

Petition for New Trial.

Order Denying Motion for New Trial, and Excep-
tions to Same.

Defendants' Exceptions to Instructions.

Order Extending Time to Present and File Bill of
Exceptions.

Judgment.

Bill of Exceptions and Certificate.

Order Allowing and Settling Bill of Exceptions.

Stipulation Waiving Service of Papers of Appeal.

Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Writ of Error and Copy Thereof.

Citation and Copy Thereof.

Acceptance of Service of Papers on Writ of Error.

Trial Notes.

This Praeceptum.

E. E. RITCHIE,
Attorney for Plaintiffs in Error.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [236]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,

Defendants.

**Order Extending Time for Filing and Docketing
Transcript on Appeal.**

Upon application of R. J. Boryer, attorney for the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, in the above-entitled cause, good cause appearing therefor—

It is ORDERED that the time for filing and docketing the Transcript on Appeal in the above-entitled action with the Clerk of the United States Circuit Court *on Appeal* for the Ninth Circuit be and the same is hereby extended and enlarged to and including the 22d day of September, 1913.

Signed this the 25th day of June, A. D. 1913.

FRED M. BROWN,

Judge.

It is hereby stipulated by and between E. E. Ritchie, attorney for James Heney and R. J. Boryer, attorney for the Copper River & Northwestern Railway Company, and Katalla Company, good cause appearing therefor, that the time of filing and docketing the transcript on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended and enlarged to and including the 22d day of September, 1913.

Dated this the 24th day of June, 1913.

E. E. RITCHIE,

Attorney for James Heney.

R. J. BORYER.

Entered Court Journal No. 7, page No. 284. [237]

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [238]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Order Allowing, Certifying and Settling Bill of Exceptions.

It appearing to the Court that the defendant has prepared and duly served upon attorney for the plaintiff within due time a proposed Bill of Exceptions, and said proposed Bill of Exceptions having been delivered to the Clerk of the above-entitled court for the Judge thereof, and the Clerk having delivered said Proposed Bill of Exceptions to said Judge, and said Judge of said court having duly designated the 25th day of June, A. D. 1913, as the time at which he would settle the Bill of Exceptions, and both plaintiff's and defendant's attorneys having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 25th day of June, A. D. 1913, and the attorneys for both plaintiff and defendant being present.

IT IS THEREUPON AND IS HEREBY ORDERED that the proposed Bill of Exceptions be allowed and the same shall be and is hereby settled and allowed as a Bill of Exceptions herein, and the same shall be presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conform to the truth and is in proper form. [238a]

IT IS THEREFORE ORDERED that the said bill is a true Bill of Exceptions and the same is hereby approved, allowed and settled and ordered filed and

made a part of the record of this cause.

Done in open court this the 25th day of June, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 280.
[238b]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants.

Court's Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled Court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true Bill of Exceptions, and the same has been and is approved, allowed and settled and ordered filed and made a part of the record of said cause.

Done in open court this the 25th day of June, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 281.
[238c]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff and Appellee,
vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and KA-
TALLA COMPANY, a Corporation,
Defendants and Appellants.

Certificate of Clerk U. S. District Court to Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 238 pages, numbered from 1 to 238, inc., are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office. That this transcript is made in accordance with the defendant and appellant's praecipe on file herein and I hereby certify that the foregoing transcript has been prepared and certified to by me, and that

the cost thereof, amounting to \$101.00, was paid to me by R. J. Boryer, attorney for defendant and appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 2d day of August, A. D. 1913.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division. [239]

[Endorsed]: No. 2300. United States Circuit Court of Appeals for the Ninth Circuit. Copper River & Northwestern Railway Company, a Corporation, and Katalla Company, a Corporation, Plaintiffs in Error, vs. James Heney, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed August 11, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

